

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

UNITED STATES OF AMERICA

v.

CRIMINAL CASE NO.
JFM-16-469

MARTIN ROBERT HALL,

Defendant

_____ /

(Motions Hearing)
Wednesday, August 30, 2017
Baltimore, Maryland

Before: Honorable J. Frederick Motz, Judge

Appearances:

On Behalf of the Government:

Paul E. Budlow, Esquire

Kaylynn Shoop, Esquire

On Behalf of the Defendant:

Adam D. Fein, Esquire

Marc Johnson, Esquire

Reported by:

Mary M. Zajac, RPR, FCRR

Fourth Floor, U.S. Courthouse

101 West Lombard Street

Baltimore, Maryland 21201

1 (Proceedings at 9:43 a.m.)

2 MR. BUDLOW: Your Honor, this is United States of
3 America versus Martin Robert Hall. It is Criminal Number
4 JFM-16-469. This matter is scheduled before Your Honor this
5 morning for a motions hearing.

6 I'm Paul Budlow on behalf of the government. Joining
7 me at counsel table is trial attorney Kaylynn Shoop from the
8 Trial Division, from the Criminal Division of the Department of
9 Justice, and also FBI Special Agent Rachel Corn.

10 MR. FEIN: Adam Fein on behalf of defendant Martin
11 Hall, Your Honor. Marc Johnson is present with me, but he
12 stepped out of the courtroom for just a moment.

13 THE COURT: Okay. Please be seated. I think the first
14 issue to take up is my granting of the motion to quash. There
15 was very little time to respond to the motion, and it seemed to
16 me to be well founded. And, Mr. Fein, anything, you can move to
17 reconsider the motion, my granting the motion, whatever.

18 MR. FEIN: Thank you, Your Honor. As you indicated,
19 there was just a small amount of time. I received the motions
20 from the government the day before yesterday. Yesterday was a
21 travel day for me. I received a phone call or, rather, Mr.
22 Johnson informed me at some point that the Court had granted the
23 government's motion to quash. The subpoena, just to be clear, is
24 for a state court judge, Colleen Cavanaugh, who is the judge that
25 signed off on the warrant authorizing the search of Mr. Hall's

1 home and the seizure of items therein related to the
2 investigation in this case.

3 So the government filed a motion in limine, and that
4 motion in limine cited a number of cases in what I would describe
5 as a string-cite fashion, not descriptions of the cases, the
6 facts of those cases, the holdings of those cases. So if I could
7 address this relatively briefly.

8 In this particular case, the issue that I wish to
9 address with Judge Cavanaugh and the issue that was before this
10 Court would be whether or not the judge abdicated her role as a
11 neutral and detached magistrate. As the Court knows, in Leon,
12 the Supreme Court case, the courts established a good faith
13 exception to the exclusionary rule.

14 To that exception, there were four exemptions. One of
15 those exemptions, that is one of the scenarios under which the
16 good faith exception would not apply, is when a magistrate judge
17 or a search warrant issuing judge abdicates their role as a
18 neutral and detached magistrate. In that instance, the good
19 faith exception to the exclusionary rule would not apply.

20 In its motion, the government cites several cases. One
21 of those cases is called Wellman, which is a Fourth Circuit case,
22 suggests that in some cases when the statements in an affidavit
23 are non-conclusory, but still are insufficient to support a
24 finding of probable cause, that it is perhaps best in those cases
25 to look at the various scenarios laid out in Leon, that is the

1 four scenarios under which the good faith exception would not
2 apply, and to consider that rather than the neutral and detached
3 magistrate exemption, that the exemption for officers who are
4 reasonably well-trained would not recognize, should recognize
5 that there's a deficiency in the warrant which would not support
6 a finding of probable cause.

7 The Fourth Circuit, though, has also noted in other
8 cases other occasions where it is appropriate to make a
9 determination about whether or not a neutral and detached
10 magistrate judge has failed to fulfill his or her role. So, for
11 example, another case cited by the government, a case called
12 Wilhelm, 80 F.3d 116, Fourth Circuit, '96 case. In that case,
13 the Fourth Circuit affirmed that the affidavit was too conclusory
14 and the judge, in signing off on that affidavit, abdicated his
15 role as a neutral and detached magistrate by simply accepting the
16 conclusions of officers; as a result, affirmed the suppression of
17 the material seized in reliance on the warrant under that third
18 prong of the Leon good faith rule, the exception to the Leon good
19 faith rule.

20 So sometimes the neutral and detached magistrate
21 exemption is best construed as a different form of exemption, as
22 in Wellman. Sometimes it is not. And it's appropriate to
23 consider whether or not the judge did or did not abdicate his or
24 her role.

25 Sometimes there are different facts that might lead to

1 a conclusion that the judge abdicated his or her role as a
2 neutral and detached magistrate. So, for example, in an Eighth
3 Circuit case, Decker, which is at 956 F.3d 773, and at Pages 776
4 to 78, the Eighth Circuit, 1992, the judge in that particular
5 case, that is the issuing judge, was alleged to have failed to
6 read the affidavit filed in support of the warrant. To determine
7 whether or not that was so, the judge was called as a witness.
8 The judge testified. The judge testified that he had read the
9 warrant, but perhaps in a cursory manner. The magistrate in that
10 particular case found the judge did not read the warrant. The
11 magistrate made that finding because the warrant had multiple
12 errors in it. Those errors would have been relatively obvious to
13 somebody who read the warrant with some degree of care.

14 Based on that, based on those errors, based on the
15 judge's statement that he relied largely on the conclusions of
16 the officers, the court, the magistrate court, the federal
17 magistrate court, suppressed the evidence seized in reliance on
18 the search warrant issued by the state court judge. The district
19 court affirmed the magistrate. The Eighth Circuit affirmed the
20 district court.

21 That was only possible because of the testimony of the
22 issuing judge in that case. There would be no way to know if the
23 judge had read the warrant. The judge had simply relied on the
24 conclusions of the officers, unless those facts were testified to
25 by somebody. And the only person in possession of those facts

1 would have been the issuing judge in that particular case.

2 In another case, United States v. Dickerman, which is
3 at 416-CR-258, currently pending in the Eastern District of
4 Missouri, that case involves a Freenet investigation, much like
5 this investigation. I'm the attorney of record in that case. I
6 subpoenaed a state court judge. That state court judge is the
7 judge who had signed off on the warrant authorizing the search
8 and seizure in that case.

9 The government objected to the testimony of the judge.
10 The magistrate in federal court permitted the judge to testify.
11 And I simply asked factual questions of that judge. For example,
12 I asked that judge if he understood the affidavit that he read.
13 In a candid bit of testimony, he admitted that he did not. And
14 he, in fact, stated that it appeared as Greek to him.

15 So nobody would have had possession of those facts but
16 that judge. The only way to get that information from the judge
17 was to ask him. He might have well come in and testified and
18 said that he understood the affidavit perfectly. But he did not.
19 He was candid about that and said he did not. So another case in
20 which the only person in possession of factual matters that were
21 relevant to the issue before the court was the judge, and the
22 judge was permitted to testify, and he did.

23 In addition, there are cases from within the circuit,
24 from district courts that are sisters to this particular district
25 court, where judges have testified in the same setting in the

1 same context. So, for example, in United States v. Clyburn,
2 C-L-Y-B-U-R-N, at 806 F.Supp. 1247, the defendant moved to
3 suppress evidence seized in reliance on a warrant on multiple
4 grounds. One of the grounds was that the state court judge who
5 signed off on the warrant had abdicated his role as a neutral and
6 detached magistrate. That case involved a drug investigation.

7 The judge was called as a witness by the defense to
8 testify. The judge was a William Sanders, a Sumter County
9 magistrate. That judge did testify in the case and was permitted
10 to do so.

11 In United States v. Gary, 420 F.Supp. 2d, at 470,
12 another narcotics investigation in which the defendant moved to
13 suppress evidence seized in reliance on a warrant, again arguing
14 that the judge had abdicated his role as a neutral and detached
15 magistrate, the allegation was the judge didn't read the warrant
16 affidavit or read it in too cursory a manner. The judge was
17 called to testify and did so testify.

18 Another case is United States v. Jarvis, 2009 Westlaw
19 2707563. That's from the Northern District of West Virginia. In
20 that particular case, also a drug investigation, there was an
21 allegation that the judge abdicated her role as a neutral and
22 detached magistrate. The judge was called to testify. The judge
23 did testify. In Jarvis the allegation was that the state court
24 judge was a relative of one of the task force officers working on
25 the case, and that is the mother of a task force officer. She

1 testified that though she was the mother, she was unaware of it
2 at the time that she was involved in issuing the warrant.

3 And just to be clear, in United States v. Clyburn, the
4 allegation was that the office, that the judge was too involved
5 in the ongoing investigation, was alleged that he had admitted to
6 bail a cooperating individual so he could assist in the
7 government's prosecution, among others things. He testified to
8 the facts in that case.

9 And in United States v. Gary, as I said, the issue was
10 whether or not the judge had read the affidavit.

11 In each and all of those case, just as in Decker, the
12 Eighth Circuit case, and in Dickerman, the Eastern District of
13 Missouri case, the allegations centered on factual matters
14 surrounding the issuing judge and whether or not the facts
15 suggested that the judge had abdicated his or her role as a
16 neutral and detached magistrate.

17 Now, the government cites several cases to suggest that
18 it's inappropriate to call a judge as a witness. None of those
19 cases take place in the context of Leon. More specifically, none
20 of those cases take place in the context of which there's an
21 allegation that the judge has abandoned his or her role as a
22 neutral and detached magistrate.

23 Moreover, all of those cases discuss whether or not
24 it's appropriate for a judge to be called to testify regarding
25 their mental processes, their decisionmaking process, as opposed

1 to the facts that might be relevant to a, as opposed to the facts
2 that might be relevant to a reviewing court's determination.

3 So, for example, the court cites a case called Roth
4 from the Southern District of New York, a 2004 case. In that
5 case, it was a federal matter. A state court judge was called as
6 a witness. And the issue there that the defense hoped to explore
7 was why the decisionmaking process of a judge in a state case
8 accepted a plea in a matter that was then before the state court
9 judge. So in that particular case, as the Roth court noted, what
10 the defense hoped to explore was the mental processes, the
11 decisionmaking process of the state court judge in accepting a
12 plea agreement. It was a plea that reduced a charge of the
13 defendant's from second-degree murder to manslaughter.

14 A second case that's cited along with Roth is called
15 St. John, which simply affirmed the holding in Roth.

16 Another case the government cites is a case called
17 Morgan, a Supreme Court case from 1941. That was a very involved
18 matter that involved the Secretary of Agriculture. It was an
19 11-year-long matter. The Secretary of Agriculture was deposed on
20 all sorts of matters relating to the decisionmaking process and
21 the mental processes of the Agriculture Department in issuing
22 some rule. Notably, that case predates Leon by -- what -- 43
23 years? So the scenario that's before the court today in which
24 judges have been permitted to testify to facts would not even
25 have been contemplated by the court in Morgan simply because

1 Leon, the good faith exception, the exemption that's at issue
2 here, were not even contemplated by the Supreme Court at that
3 time.

4 Fayerweather v. Ritch, which is another case cited by
5 the government in its string cite, is from 1904. That involved a
6 rather complicated will contest where the judge that originally
7 resolved the will disputes was asked to testify in a subsequent
8 matter about how and why he came to decisions that he did. That
9 case not only pre-dates Leon by about 80 years, but it pre-dated
10 Mapp by 61, by about 50-some-odd years, and pre-dated Weeks by
11 about 10 years.

12 So again, the situation that's before this court today
13 could not have even been contemplated by the Supreme Court at
14 that time.

15 The government also cites a case of Grant v. Shalala.
16 That is, again, a rather complicated Social Security disability
17 matter. In that particular case, there was a suit by a
18 beneficiary to disability benefits who not only wanted to
19 question the judge in the case based on an alleged amount of bias
20 that that judge harbored towards disability beneficiaries, not
21 only the particular plaintiff in that case, Grant, but a series
22 of others, Grant sought to have a class recreated which would
23 challenge the judge's neutrality in disability determinations.
24 They sought to explore the Social Security judge's decisionmaking
25 process, his work habits, his private communications. They

1 deposed an assistant of his, maybe two, and went into all sorts
2 of matters that are simply not at issue here. I have no interest
3 in the decisionmaking process why this judge made the decision
4 she made, what degree of weight she gave to any particular factor
5 or factors. Simply some factual questions that I'll get to in a
6 moment.

7 Another case the government cites, which I think is
8 interesting, is a case out of the Middle District of Georgia,
9 called Cross. And this is cited at 516 F.Supp. 700. And that
10 case involved a claim by a defendant in a criminal case that the
11 grand jury selection or, rather, the selection process for the
12 foreman of a grand jury was discriminatory in that particular
13 jurisdiction and had been over time. That defendant sought to
14 call the judge involved in the foreperson selection process to
15 testify.

16 That case went up on appeal to the 11th Circuit. And
17 the 11th Circuit noted that, in these cases, both within the 11th
18 Circuit and outside the 11th Circuit, there have been no
19 difficulties in calling judges to the stand to testify about the
20 facts underlying their decisions and determining who would be the
21 foreperson for a grand jury.

22 So, for example, in Cross at the 11th Circuit, which is
23 reported at 708 F.3d 631, Pages 638 to 39, the 11th Circuit noted
24 that in the Southern District of Florida, in an analogous
25 situation, eight judges testified.

1 We note that in the Middle District of Florida in a
2 similar case challenging the selection of a grand jury
3 foreperson, one judge testified.

4 In the Northern District of Georgia, another case, the
5 government itself called nine judges to testify about their
6 selection process. That case was called Breland. It's reported
7 at 522 F.Supp. 468. And the relevant discussion is at 471
8 through 474.

9 In a fourth case cited in the 11th Circuit's
10 cross-opinion, the 11th Circuit noted that judges in another case
11 had voluntarily testified as to the process they go through in
12 selecting forepersons for the grand jury.

13 Now, the Supreme Court subsequently reversed and
14 vacated that case, but on different grounds. It reversed and
15 vacated solely on the ground that errors in the selection process
16 for a foreperson of the grand jury are not sufficient to lead to
17 reversal. It did not speak, that is the Supreme Court did not in
18 any way speak to the propriety of calling the judges to testify
19 in those cases.

20 So I think what the Court can glean from all of this is
21 the following. There was a series of cases that suggest it is
22 improper to have a judge testify to their mental processes and
23 decisionmaking process. It is appropriate for a judge to be
24 called to testify about factual matters.

25 In this case, all I am curious about are factual

1 matters. Those factual matters are relevant to whether or not
2 the judge abdicated her role as a neutral and detached magistrate
3 or not. So, for example, is the judge familiar with the Freenet
4 software's operation? Is the judge familiar with the law
5 enforcement investigation of Freenet? Did the judge understand
6 the facts of the investigation described in the affidavit that
7 was supplied to her? Those are simple factual questions. It
8 does not explore her thought processes. I'm asking her to tell
9 me why she granted the warrant, what weight she assigned to any
10 particular fact in the warrant. They're simply factual
11 questions. Did you understand what you read? Did you read it?
12 And are you familiar with it? That is all.

13 She may answer that she is perfectly familiar with it,
14 that she understood it all, and I'll have gained nothing by that.
15 She might answer more candidly, as did the judge in the Eastern
16 District of Missouri case. I have no idea what she will answer.
17 But there is only one person who has that information. That
18 would be the state court judge.

19 In the absence of my ability to ask her those
20 questions, there would be no way for this court to make a
21 determination as to whether or not that judge did or did not
22 abdicate her role. So this Court will foreclose to Mr. Hall the
23 opportunity to explore those facts if it continues or maintains
24 its position that the warrant, that the subpoena was
25 inappropriately issued, and quashes it.

1 It will deprive him of the ability to pursue his Fourth
2 Amendment claim, which the Supreme Court has said is an
3 appropriate claim. And that is that the warrant may well be
4 insufficient because of the judge's abdication for a neutral and
5 detached role.

6 So she is the only one in possession of those facts,
7 essentially factual matters, and Mr. Hall should have the right
8 to explore that if he is to make his claim.

9 The government's cases have merits, but on a different
10 issue, and that is if I were exploring the mental processes and
11 the decisionmaking process of the judge, that is Judge Cavanaugh,
12 and I am not and have no decision to do so.

13 THE COURT: Thank you. I realize I did not invite
14 anybody from the Attorney General's Office to be here. Is
15 anybody from the Attorney General's Office here?

16 MR. BUDLOW: No. I spoke to Assistant Attorney General
17 Michele McDonald yesterday evening, Your Honor. She said that
18 her day was completely booked already. It was her understanding
19 that this motion --

20 THE COURT: Do you want to be heard, Mr. Budlow?

21 MR. BUDLOW: Very briefly, Your Honor. Mr. Fein just
22 spoke for, I don't know, roughly 20 minutes. But at the very end
23 we heard a very quick synopsis of exactly what this is all about,
24 which is he wants to put the issuing magistrate judge on the
25 stand to ask this question: Did you understand the affidavit?

1 That's the question. He just admitted it again.

2 Now, first of all, we can take issue with that is not a
3 factual question. That is exactly a mental processes question.
4 Did you understand?

5 But leaving that as an aside for a minute, there is not
6 one case that he cited, not one case that I could find, not one
7 case that Ms. McDonald could find, that hold that under these
8 circumstances a defense attorney can call the judge who signed a
9 search warrant affidavit, who authorized a search, to ask
10 questions about whether or not the judge understood the nature of
11 the words written on a piece of paper. In fact, the cases that
12 we cited clearly indicate the opposite.

13 Your Honor, a lot of the cases that Mr. Fein cited deal
14 with completely different factual scenarios, but not one of them
15 appeared to contest the issue of whether or not it was
16 appropriate for the judge to testify. So just because Mr. Fein
17 called a judge and the judge testified doesn't mean it was
18 right.

19 And I'll give you an example, Your Honor. I'm very
20 familiar with Mr. Fein's case in St. Louis where he called the
21 judge to testify. I have the transcript of that testimony. And
22 I'll tell you two things. I don't see where the judge admitted
23 to not having read the warrant. But more importantly, nobody was
24 given any warning. The judge received the subpoena, showed
25 up, did not get counsel. The government had no idea the judge

1 was going to be testifying until the moment Mr. Fein called that
2 judge as a witness. So that case, to say it wasn't fully
3 litigate on this issue, just like all of the other cases that Mr.
4 Fein cited where judges testified, but that wasn't the issue on
5 appeal, is an understatement.

6 Additionally, Mr. Fein is conflating various issues
7 relating to how a court should analyze a search warrant. Leon is
8 the exceptions to the good faith exception. Leon lists the
9 various times when the court would not apply good faith. But you
10 don't get to Leon until you've already found that there is no
11 probable cause.

12 What Mr. Fein is trying to do is take one of the
13 exceptions to good faith and use it as a bootstrap to establish
14 that there is no probable cause. But that's just not the
15 analysis. The analysis in this case, and in every case where
16 there's a search warrant, is looking at the four corners of the
17 warrant, whether there's sufficient basis for that magistrate
18 judge, in this case a Circuit Court judge in Baltimore County, to
19 issue the warrant.

20 And the last thing on the Leon issue is that he's also
21 using the wrong prong of Leon. So Leon and the cases that have
22 dealt with Mr. Fein's allegation somehow that the search warrant
23 in this case is insufficient say that you don't then analyze the
24 exception typically on whether or not the judge was not neutral
25 and detached or acted as a rubberstamp, but instead look at

1 whether or not a reasonable detective, a reasonable investigator
2 would nevertheless believe that that search warrant was properly
3 authorized. And that's where the focus should be with respect to
4 Leon, which, again, you would not get to until there was a
5 finding of probable cause.

6 To be clear, in this case the government's going to ask
7 the court down the road this morning or this afternoon to find
8 that there was probable cause, but also to find that, in the
9 event there wasn't probable cause, that there was good faith on
10 behalf or by Detective Rees.

11 But I think what's clear here is that Mr. Fein is
12 trying to couch the allegations that he wants to discuss with the
13 circuit court judge, the allegations that he's made in his motion
14 as anything other than a mental process, and that's just simply
15 not the fact.

16 When you boil it down, what are the facts that he's
17 alleged? In his motion, he's saying there isn't probable cause
18 and he's saying that a reasonable magistrate judge, an appointed
19 circuit court judge, couldn't understand it. That's what his
20 claim comes down to. That's the facts that he wants to address
21 with the judge. And that's not appropriate.

22 So in addition to the cases and the canons of judicial
23 ethics that say that the judge shouldn't be called as a witness,
24 there's really no relevance in this case whatsoever.

25 Court's indulgence for one moment.

1 Your Honor, the last thing I'd add is if, under these
2 circumstances, the defense is allowed to call a judge to say, the
3 issuing judge to say, did you understand the words printed on a
4 piece of paper, that's essentially giving the defense attorney
5 carte blanche in every case to go on a fishing expedition to ask
6 questions about everything that's in the search warrant. Do you
7 understand DNA evidence? Do you understand what it means when a
8 detective or a special agent says I believe that the images that
9 I have viewed portray sexually explicit conduct involving a
10 minor? Do you understand money laundering terms?

11 This is, the purpose of the affidavit is for the
12 affiant to set forth in the plain English language, that a
13 reasonable magistrate can understand, probable cause. That's a
14 decision we'll get to later today. But that is where the danger
15 in what Mr. Fein wants to do would really open the doors to
16 having every search warrant affidavit later be subject to the
17 testimony of the magistrate.

18 MR. FEIN: If I may, Your Honor.

19 THE COURT: Yes.

20 MR. FEIN: So I don't think it's for the government to
21 determine what I want to address. I simply want to explore some
22 factual matters with the judge that will take but a moment. And
23 I think the real danger is this; that our government expects
24 transparency from the citizenry, it expects us all to expose
25 ourselves to its questions when it wants, when it likes, like Mr.

1 Hall, but it seeks to insulate from any scrutiny the judges who
2 preside over matters. That they are somehow untouchable, as if a
3 king or a queen presiding over a fiefdom, that they are not
4 susceptible to scrutiny by those who are charged by the
5 government.

6 These are simple factual matters. To ask if somebody
7 understood something isn't to ask her why she came to a
8 particular conclusion, which are the issues at stake in all the
9 cases the government recited string cites for. It's simply to
10 ask, did you understand, are you familiar with this? She may say
11 yes, she may say no, but that would be the end of the matter.

12 If Mr. Hall is not allowed to explore these kinds of
13 matters, the judge can't make the determination that the law
14 requires him to make. And that is, did the judge engage in a
15 neutral and detached contemplation of the facts that were
16 contained in the affidavit that was submitted to her in support
17 of the search warrant.

18 I don't know if the court has had the chance to take a
19 look at the cases that the government cited, but they are far
20 afield. As I said, those from the Supreme Court simply far
21 predate the issue that's before the court today. The Supreme
22 Court could not have contemplated these issues that arise from
23 the Leon analysis in 1940 or 1904 because Leon and the good faith
24 exceptions and the four exemptions to that rule had not been
25 established at that point in time.

1 So the Court will make its ruling, to be sure. If it
2 rules against me, I'll object. But I think that in a court of
3 law where a judge makes a determination that impacts citizens
4 through the search warrant process, and a defendant seeks in a
5 complicated, unusual matter -- not a typical drug investigation,
6 not a small money launder -- I'll retract that. Money laundering
7 matters aren't small, but they're not as factually complicated as
8 are internet-based, computer-based searches and seizures. So
9 these are unusual.

10 The cases I've cited, it's true that there wasn't --
11 you can't tell from the opinions -- it doesn't appear that there
12 was a ruling from the court that it's entirely proper to call the
13 judge or entirely improper to call the judge. It's not just my
14 case. There are cases from sister circuits within the Fourth
15 Circuit where judges were called to testify.

16 In addition, the cross-case cited by the government
17 indicates for factual matters it was entirely appropriate to have
18 judges testify in open court about the decisionmaking process of
19 selecting a foreperson for the grand jury. It's difficult for me
20 to determine how that would have been appropriate, but it's
21 inappropriate here.

22 My questions may go nowhere. They may yield nothing
23 that's of help to Mr. Hall. But he has every right to put them
24 to a judge as long as they simply explore facts. That's all they
25 do.

1 Mr. Budlow would have you think that everything is a
2 mental process. To some degree, that's true. Any time I speak,
3 I am engaging in a mental process. Any time anybody puts a
4 question to me and I answer, I am engaging in a mental process.
5 But those mental processes may go to facts and they may go to
6 decisionmaking. The questions I have to put to the judge simply
7 relate to facts, not the decisionmaking process.

8 So I'd ask the Court to reconsider its ruling, allow me
9 to put these simple questions to the judge, and attempt to assist
10 Mr. Hall in his defense in the process.

11 Thank you, Your Honor.

12 THE COURT: Thank you. I'm going to deny the motion to
13 reconsider my ruling. I think Mr. Fein inevitably is going to
14 get into the mental state of the judge, and I think that the
15 affidavit in support of the warrant speaks for itself. And I
16 will so rule one way or the other later in these proceedings.
17 Okay. Mr. Budlow.

18 MR. BUDLOW: Yes, Your Honor. I was wondering, if,
19 Court's indulgence, I can provide maybe you with a little bit of
20 an outline as to where I see things going today.

21 THE COURT: Sure.

22 MR. BUDLOW: There's two motions pending before the
23 Court. The first one is a motion to suppress evidence obtained
24 by way of a search warrant and a law enforcement investigation.
25 That's Document 44 filed by the defense. And the second one is a

1 motion to suppress statements filed by the defense, relating to a
2 defendant's recorded statement that he provided the day the
3 search warrant was executed. That's Document 43.

4 With respect to the motion to suppress the search
5 warrant, which the government would request to go first, there's
6 essentially three issues. I'm not going to necessarily address
7 them, but I want to explain to the Court what the witnesses that
8 the government proposes are going to testify to.

9 Very generally, the three issues the defense raises
10 are, one, that the pre-search warrant investigation by law
11 enforcement was improper because, one, it was searched, and two,
12 it was a violation of the Electronics Communication Act, by
13 intercepting wire communications.

14 The third issue that the defense raises, more relevant
15 to what we just discussed, relates to the validity of the search
16 warrant, whether or not there's probable cause.

17 With respect to that overall motion relating to the
18 evidence, the government plans to call one witness, which is
19 Adam -- Brian Levine. Brian Levine, not Adam. And he's going to
20 testify relating to the workings of Freenet and whether or not it
21 is, in fact, a search at all, and whether or not it intercepts
22 any content, and various factors relating to that.

23 With respect -- and that's the only witness the
24 government plans to call on that issue.

25 With respect to the third issue relating to the

1 affidavit, the government does not plan on calling any witnesses
2 whatsoever. The government believes that no witnesses would be
3 appropriate. We're going to argue that, based on the four
4 corners of the warrant, the search warrant affidavit is
5 sufficient.

6 With respect to that issue, my understanding is that
7 the defendant wishes to call the affiant relating to the search
8 warrant affidavit. Just so we're clear -- we can deal with it
9 later -- the government objects to that. That's essentially
10 asking for a Franks hearing. The government does not believe
11 that a Franks hearing is appropriate in this case.

12 Then there's the second motion that the defense filed,
13 which is the statement that was given by the defendant on the day
14 of the search warrant. The individual who took the statement and
15 provided the Miranda rights is Detective Joshua Rees. He's here
16 and the government is planning on calling him only on the issue
17 of providing of Miranda and voluntariness and other issues
18 relating to the statement.

19 And you've dealt with the third issue that I had, which
20 is the motion to quash. So that's sort of how we see things
21 moving forward from here, Your Honor.

22 With respect to the testimony, I think there's maybe
23 two hours of direct testimony between those two witnesses.

24 THE COURT: Okay.

25 MR. FEIN: Just quickly, if I may. With respect to the

1 Court's ruling on the subpoena, I just want to, for the record,
2 formally object to the Court's factual finding that my efforts
3 will explore the mental processes of Judge Cavanaugh, as opposed
4 to factual matters. And secondly, object to the Court's
5 conclusion that the subpoena was therefore improperly issued.

6 MR. BUDLOW: Your Honor, moving forward with respect to
7 the motion to suppress evidence, Ms. Shoop is going to be taking
8 the lead for the government on that matter. I'll let her address
9 the Court at this time.

10 THE COURT: Okay. Let's go.

11 MS. SHOOP: Yes, Your Honor. Good morning. The
12 government is going to call one witness, and that's going to be
13 Dr. Brian Levine.

14 THE COURT: Okay.

15 THE CLERK: Doctor, you may step up to the witness
16 stand. Please face me and raise your right hand.

17 DR. BRIAN LEVINE, GOVERNMENT'S WITNESS, SWORN

18 THE WITNESS: Yes, I do.

19 THE CLERK: Thank you. You may have a seat. You may
20 pull your chair up to the table, adjust that microphone down in
21 front of you. Please state and spell your full name for the
22 court.

23 THE WITNESS: My name is Brian Levine. L-E-V, or
24 B-R-I-A-N. L-E-V-I-N-E.

25 THE CLERK: Thank you. And there's water behind you if

1 you need it.

2 DIRECT EXAMINATION

3 BY MS. SHOOP:

4 Q Good morning, Dr. Levine.

5 A Good morning.

6 Q Where do you currently work?

7 A Currently I'm a professor of, I'm a professor in the College
8 of Information and Computer Sciences at the University of
9 Massachusetts Amherst.

10 Q And how long have you been a professor?

11 A I've been a professor there since 1999. So I'll start my
12 19th year in a couple days.

13 Q And are you tenured at the university?

14 A Yes. I received tenure in 2005. At that time, I was also
15 promoted to associate professor. Then in 2010, I was promoted to
16 full professor.

17 Q And you mentioned you were a member of the College of
18 Information and Computer Sciences. What is that?

19 A It's a collection of faculty at the university that
20 specialize in information and computer sciences.

21 Q Dr. Levine, what type of classes do you teach at the
22 university?

23 A I teach a variety of classes over the years. They are, they
24 are largely focused on networking the internet, peer-to-peer
25 networks, and computer network security.

1 Q And do you have any publications?

2 A Yes. One of my main jobs at the university is to produce
3 peer-reviewed public research. So since before then, while I was
4 a graduate student, I've been producing those publications.
5 Currently, I have somewhere north of 80 or 90 peer-reviewed
6 publications.

7 Q And how about publications specifically regarding
8 peer-to-peer networks?

9 A That is one of my main, that's probably the main focus of my
10 research. So the majority, if not the vast majority, of those
11 publications are on peer-to-peer networks.

12 Q And the peer-to-peer network that we're going to discuss
13 today is called Freenet. Have you published anything in
14 particular regarding Freenet?

15 A Yes. Earlier this year, I published a paper in a
16 peer-reviewed workshop on Freenet, including a method of
17 investigating child pornography trafficking on Freenet.

18 Q I have Government Exhibit Number M-2, which was also
19 attached to the government's motion response. I'm going to put
20 it on the ELMO. Can you see that, Dr. Levine?

21 A I can.

22 Q This is an eight-page document. I can briefly go through
23 the pages. Do you recognize this?

24 A Yes. That's the article I just referred to.

25 Q Is that the entire article?

1 A It appears to be. Yes. As you flip through it, I can see
2 it. It's all eight pages.

3 Q Okay. Now, has your publications on Freenet, has that been
4 peer-reviewed?

5 A Yes. It was peer-reviewed in IEEE workshop, IEEE
6 international workshop on privacy engineering. IEEE is one of
7 the two professional societies for my scientific field. That
8 particular workshop went through what I consider a strong
9 peer-review process. Before I submitted the paper, they retained
10 a collection of experts in this field -- professors,
11 professionals with doctorates, and so on. My paper which I
12 wrote, of course, as you saw with co-authors, it was submitted
13 without our names on the paper. I'm unaware of which members of
14 that what's called the Program Committee, the set of reviewers,
15 which three of them reviewed the paper. But I did receive their
16 comments. And as part of their commentary, the paper was
17 accepted by them. And then subsequently, the paper's been
18 publicly available on the workshop's website.

19 Q And when was that peer-reviewed?

20 A It was earlier this year. I don't remember the exact month
21 that we submitted it. But the workshop itself was in May, May
22 24th, I believe, of this year.

23 Q Dr. Levine, do you have a CV?

24 A I do.

25 Q And did you provide that to the government?

1 A I did.

2 Q I'm going to show you what has been marked as Government
3 Exhibit Number M-6. Your Honor, this has not been attached to
4 the government's motion. Do you recognize this document, Dr.
5 Levine?

6 A Yes. That's my CV.

7 Q It is a -- briefly review this -- a nine-page document. Is
8 that an accurate representation of your training and experience?

9 A Yes.

10 Q Your Honor, at this time the government would offer this
11 exhibit, Government Exhibit Number M-6, into evidence for the
12 motions hearing.

13 THE COURT: It's already in.

14 MS. SHOOP: Perfect. Your Honor, the government would
15 also move to qualify Dr. Levine as an expert in the field of
16 peer-to-peer networking and network security.

17 THE COURT: Any questions about qualifications?

18 MR. FEIN: No objection.

19 THE COURT: Okay.

20 BY MS. SHOOP:

21 Q Yes, sir. Dr. Levine, what are peer-to-peer networks used
22 for?

23 A Peer-to-peer networks are used by persons on the internet to
24 trade files, such as images, movies, and so on. They are
25 different than other applications on the internet in that it's a

1 set of volunteers who have essentially banded together to provide
2 their internet service that they've acquired, their home
3 computers. And through this banding together they're able to
4 provide services such as the trading of files and documents.

5 Q And I think -- yes. I think you mentioned videos. What
6 other type of files can people trade on peer-to-peer networks?

7 A Really, anything that can be stored on a computer. As you
8 say, videos, images. You could trade whole websites if they're
9 simple enough. Anything, really anything you could store on a
10 computer, generally.

11 Q Now, Freenet, which is at issue in this motions hearing
12 today, is that a type of peer-to-peer network?

13 A Absolutely.

14 Q When was Freenet developed?

15 A Well, it was developed first in, I think it started in 1999,
16 but I think the first publication was in 2000. There was a more
17 major -- maybe that was more of a tech report. But I know there
18 was a peer-reviewed publication in 2001. There's been a number
19 of subsequent publications by the original developers, as well as
20 other academics. I'm not sure when they first implemented the
21 network, but I think it was largely around 2001 as well.

22 "Implemented" meaning available for third parties to use and
23 trade files. And it's been under development ever since and
24 continues today.

25 Q Now, when did you first become aware of Freenet?

1 A It was a long time ago. But my recollection is that I
2 became aware of it around 2001 with that peer-reviewed article
3 because that is, peer-to-peer networks is, as I said, one of the
4 main focuses of my research.

5 And so I've been following it loosely, along with other
6 peer-to-peer networks, as part of my research. And then I became
7 much more interested in it in the last few years, resulting in
8 the article, as I said.

9 Q And would you say, Dr. Levine, that you've really studied
10 Freenet for the past five, maybe so, six years?

11 A Yes, that's correct.

12 Q So let's talk about how a user gets on Freenet. So if I'm a
13 user, I want to use Freenet on my computer, let's talk about how
14 that happens. How does someone actually get Freenet on to their
15 computer?

16 A Well, the first step would be to download the software. So
17 ahead of that, you have to go to a website to download the
18 Freenet software. And so, as common today, you would go to, say,
19 Google, type in the search term "Freenet", and if not the top
20 result, among the top couple of results that Google would return
21 would be the Freenet website. And then simply clicking on that
22 Google result, for example, would bring you to the Freenet
23 website. And then from there you would be able to download the
24 Freenet software.

25 Q I'm going to show you Page 1 of 21 of Government Exhibit

1 Number M-1. What is that?

2 A That's the Freenet website. A capture of it, certainly.

3 Q And so you mentioned that if, for example, you went to
4 Google, you looked up Freenet, is this something someone may see?

5 A Yes.

6 Q You mentioned that they click on "download." If you look to
7 the left of that page, is that what you were referring to?

8 A Yeah. That little cloud icon with the arrow below it, right
9 below that it says "download", and that's what you would click
10 on. And then your browser would start to download the software.

11 Q So right -- give me one second. Is that what we're
12 referring to right there?

13 A Exactly.

14 Q Now, you said that after you click on "download", what would
15 happen?

16 A Your browser would automatically download the software.
17 Depending on how your browser's configured, that installation
18 program would start to run. And then Freenet would provide you
19 with some information during the installation, typical software
20 questions such as where would you like this application stored.
21 Basic questions like that.

22 Q I'm going to show you Pages 2 through 8 of 21. You can take
23 a look at the screen. Now, you mentioned that the user would
24 have to go through those series of questions and click things to
25 actually install, is that correct?

1 A Yes. And I should clarify that. When I said you click on
2 the cloud icon, your computer would start to download. In fact,
3 on the Freenet website, it brings you to this page. And from
4 here there's a large blue box that says "download Freenet for
5 Windows." So that's actually what you would click to start the
6 download. If you turn the page, perhaps we'll see the next.

7 Q And one thing I want to ask you about on this page. In
8 middle of the page right here, what is this?

9 A So that's that -- it's a little blurry. But it says:
10 Freenet is free and open-source software. And it also tells you
11 where the source code is available. So one thing I didn't say is
12 there's no request for money. It's not something you purchase.
13 So that's what it means to be free. It's just a simple download
14 anyone can have.

15 What it means to be open-source software is that the
16 programming code that is used to build software to run this
17 little program is available for anyone to inspect, to read, to
18 modify, as well anyone with knowledge of this particular program
19 language, which is Java.

20 It also provides a link directly to that source code.
21 It says the source code is on GitHub. So GitHub is very popular,
22 if not the most popular, place, I'm not sure, but among the most
23 popular places for individuals ranging from myself to
24 professional programmers, to projects such as Freenet. It's the
25 place, the popular place to store your open source software code

1 for people to read. It provides a nice set of wonderful
2 resources for programmers.

3 So once you have this open source software, once you
4 have the programming code, as I mentioned, you can read it, you
5 can modify it. It's analogous to if I gave you the architectural
6 and instructions for building my house, you could then recreate
7 my house and make another copy of it, modify it how you wish, and
8 so on.

9 Q We were trying to make the screen just a little clearer. I
10 know it's a little blurry. And so, Dr. Levine, after you click
11 on "download", I'm going to show you a few slides.

12 A That's a lot better.

13 Q Okay. Let me ask you this question first. You said that
14 the programming, Java, right? You mentioned Java?

15 A Yes.

16 Q That's the program that the Freenet developers used?

17 A Yes.

18 Q What is Java?

19 A Java is a programming language. It's very common. It's,
20 for example, in my, at my university, in my college, it's the
21 programming language that we teach to incoming freshman. It's
22 the programming language you use in most of our classes, the vast
23 majority of them. It's very, it's designed to be very verbose
24 and as understandable as these things are. It's very common,
25 very useful.

1 Q I'm going to show you the next few pages. You just take a
2 look at these and then we can talk about them. That's a
3 duplicate. I apologize. Now, this series of slides that I just
4 showed you, Dr. Levine, what did those represent?

5 A That is the typical process that a user would see upon
6 downloading the Freenet Install program and then launching it.
7 As I said, these are typical questions asked of the user about
8 the program. Where would you like it installed? If it was added
9 to your start menu for this Windows computer, what would you like
10 the name to be?

11 And then this final slide we see, it says we're done,
12 essentially. Right? The application may be launched by
13 selecting the installed shortcuts. And then we can see it says
14 click finish to exit. With that click box, Freenet would start
15 right away. So this is, I imagine, very typical of what users
16 would see upon running the Install program for Freenet.

17 Q Now I'm going to show you Page 9 of 21 of that same exhibit.
18 After you click that "finish" button, is this what a user would
19 see?

20 A I'm waiting for it to focus. Yes. This is the very first
21 screen you would see when using Freenet, upon its installation
22 and launch.

23 Q What is this?

24 A So we can see there are three options. Two of them are
25 really the main options I'll talk about first.

1 This is the program asking you to finish setting up
2 Freenet. That the previous windows we saw were just the
3 operating system Windows installing the program. So now we're
4 really here using Freenet for the first time.

5 So on left here, we can see this first option. It
6 says: Connect to any Freenet user. Exactly what you're
7 circling. Connect to any Freenet user, low security. And then
8 the middle, we see there's the second option of high security.
9 And the third one is really just some custom settings for
10 advanced users. It's really still about these two options.

11 So the user has to click through one of those two
12 options, low security or high security, to continue to use the
13 software.

14 Q Now, what does Freenet refer to those two options as?

15 A So the left option, low security, is referred to as open
16 net. And that's what I believe I'm here to talk about today.

17 The second option, high security, is called darknet.
18 And that's a, that's a different setting.

19 Q And so the user, when downloading Freenet, they get to
20 choose which setting they want to use?

21 A That's right.

22 Q I'm going to show you Page 10 of 21, which is a close-up
23 view of the block on the left. Which operational mode or setting
24 is this?

25 A This is the low security, or open net setting.

1 Q Does Freenet warn its users if they click on the low
2 security setting about anything?

3 A Yes. So you can see this right in front of me on this open
4 net or low security setting, it's a warning that says while
5 Freenet is safer than traditional P-to-P software, an attacker
6 with moderate resources may be able to trace your activity on
7 Freenet back to you. And then it asks you basically to use the
8 other high security mode. It says: If you have friends who are
9 also on Freenet, you can improve security by adding them as
10 friends and then connecting to only them.

11 So that's not the option here. The option is let's use
12 low security even though it may be that someone's able to trace
13 your activity. So this is a choice, this or the other option has
14 to be made before you run Freenet for the first time.

15 Q And we're going to put 9 and 21 back on the screen. Now,
16 the middle option, if the user selected high security, does
17 Freenet still warn its user anything about that?

18 A Yeah. We can see right here. It says -- thank you for
19 zooming in. It says: The high security or darknet mode. It
20 says this setting allows you to create your own Freenet darknet
21 for vastly improved security. But as I read that, that's still
22 no guarantee. It's just vastly better.

23 Q In your experience, Dr. Levine, why might a user click on
24 the low security if they could click on the high security?

25 A Well, as we just read in the low security --

1 MR. FEIN: I'm going to object, Your Honor, to
2 relevance.

3 THE COURT: Overruled.

4 A As we just read in the box -- actually, do you mind putting
5 the zoomed-in version in?

6 Q Sure. Absolutely. And I'm placing --

7 A The low security mode. So, basically, it says right there,
8 why might you choose low security? If you don't have any, quote,
9 "friends" who also run Freenet, then you're out of luck and you'd
10 have to choose the low security mode.

11 Q What does that mean if you don't have any friends that are
12 also on Freenet? What does that mean?

13 A If you haven't met someone personally who's also running
14 Freenet, where you could exchange some details, then you're out
15 of luck. If you don't know anyone either online, personally,
16 things like that.

17 Q Now, that warning page where a user has to click low
18 security or high security, how long has Freenet given those
19 warnings to its users?

20 A Well, as I mentioned earlier, Freenet is an open source
21 project. And so I mentioned that its programming code is stored
22 on GitHub. Because they are an open source project put together
23 by a set of volunteers, their website is also stored on GitHub.
24 And one of the features offered by this third party site is that
25 it keeps track of changes to the program and to the website. So

1 any third party can go in and look at when was any particular
2 line of text in the program or the website last changed. And
3 that warning has been there for years, the install. It's been
4 there, I believe, six years, that same warning that we just read.

5 Q Now, Dr. Levine, what if someone clicks on low security and
6 they then later want to change it to high security? Is that a
7 possibility?

8 A That's an option. So the whole time you're using Freenet,
9 it will tell you at the bottom exactly which mode you're in. And
10 then in the configuration menu, if you click it, you'll see that
11 you can switch between the two modes.

12 Q And I'm going to place Page 11 of 21 on the screen. You
13 spoke of a configuration menu. Is this what you're referring to?

14 A That's what I'm referring to. So I'll just wait for it to
15 focus. So one thing I'll point out at the very bottom, it says
16 security levels low. So that's the warning I'm talking about,
17 that while you're using Freenet in the browser like this --
18 exactly what you circled -- it's telling you that you're
19 currently in the low mode.

20 Q So does Freenet continuously provide its users with these
21 warnings that they're in the low security mode?

22 A That's correct. Up at the top we can see that this page is
23 about strangers on the Internet. And then in this paragraph it
24 asks you if you know at least three people who already use
25 Freenet -- exactly what you're circling -- you can enable darknet

1 mode. So Freenet will only collect your friends, greatly
2 improving your security. Still again, no guarantee.

3 Then it says: However, if you don't know anyone
4 already on Freenet or if you want maximum performance -- which is
5 another answer to your question about why you might instead
6 choose the low security mode -- if you want maximum performance,
7 you should enable open net mode and Freenet will automatically
8 connect to other Freenet modes run by strangers.

9 Q So, Dr. Levine, is this also another place where Freenet
10 warns its users about using the open net mode compared to the
11 darknet mode?

12 A That's right. And we can see further warnings down the
13 page. If you, maybe if you clear the red. Thank you. Right
14 below the paragraph you circled, it says open net mode, connect
15 to strangers and friends if you have them. Here we see this low
16 mode, which is the open net mode. It says: I do not care about
17 monitoring by third parties. And in italicized it says: It
18 might be quite easy for other to discover your identity!
19 Exclamation point. Yes. Exactly what you underlined.

20 Even further down, in darknet mode, we see this warning
21 again very near the bottom. Even under maximum security. It
22 says: I understand that Freenet is experimental and cannot
23 ensure security against certain known attacks, but I accept the
24 risks, compared to the alternatives. Below that it says, even in
25 this darknet mode, it says your real identity should be

1 relatively safe provided you only connect to people you trust.
2 But again, no guarantee at all. And then there's an option to
3 see more information on the website, or in some other archive.

4 Q Dr. Levine, how long has Freenet provided its users with
5 this set of warnings?

6 A So as I mentioned, these warnings are part of the source
7 code and the source code is available for anyone publicly to
8 view, which I did on the GitHub website. And because GitHub
9 records changes to the software, I was able to determine that
10 each of these sentences hasn't been changed in, no earlier than
11 the last seven years.

12 Q Now, Dr. Levine, once a user selects the open net
13 operational mode, low security, how do they connect to other
14 users or peers on this Freenet network?

15 A Well, so once the software's running, it handles this
16 connection to other peers, strangers, for the user. It really
17 happens behind the scenes, although a lot of that information is
18 available to the user to see as it happens, to get some notion of
19 progress as it happens.

20 Q How are those connections selected? Does the, does a user
21 select them himself or does the program select them?

22 A The programs selects them and it happens because of signals
23 between computers that are each running Freenet over the
24 internet.

25 Q Now, once a user connects to other users or peers through

1 the system -- although you mentioned those are strangers,
2 correct?

3 A That's right.

4 Q They don't know those individuals. Is there anything they
5 can learn about their identity?

6 A Of those strangers?

7 Q Yes.

8 A Yes. As I said, Freenet, the software manages connections
9 to these strangers, really their computers. This information is
10 actually displayed in the Freenet program. And you can, for
11 example, learn the IP address of every stranger that you're
12 connected to. It's made available in the program itself.

13 Q I'm putting on Page 15 of 21 on the screen. And this one is
14 printed a little blurry so I cannot make it clear. But what do
15 we see in this image?

16 A So this is the Freenet software itself telling the user, we
17 see here it says "my open net peers." And it tells the user
18 again, it's another warning, these are untrusted peers added by
19 Freenet in low or normal network security level. And then we can
20 see IP addresses there. Right? It's a little hard to see it
21 reproduced here. But I can see 185.57.31.15 it looks like on the
22 third line, for example. That is the IP address of the stranger
23 that this person is connected to.

24 Q So a user, if I'm on Freenet and I'm connected to all of
25 these other people, Freenet, if I understand you correctly, it

1 does not make any attempt to hide their IP address at all?

2 MR. FEIN: I'm going to object, Your Honor. I think
3 there's some unclarity. If I may, I think what she means is
4 users to which you are directly connected, you can see the IP
5 address. Former users to which you've been directly connected,
6 you can see the IP address, but not others.

7 THE COURT: Overruled.

8 THE WITNESS: I'm sorry, sir. I didn't hear what you
9 said.

10 THE COURT: I overruled the objection.

11 THE WITNESS: Okay.

12 BY MS. SHOOP:

13 Q Okay. Now I'll ask it again. So if I'm on Freenet and I'm
14 currently connected to these individuals where on the left it
15 says connected, I can see their IP address, is that correct?

16 A Yes.

17 Q Does Freenet make any attempt to hide a user's identity with
18 their IP address?

19 A No. We can see it right here on the screen.

20 Q Now, does a user, for example, if I'm connected to 10 other
21 users, can that change over time the number or the folks that I'm
22 actually connected to?

23 A Yes. Users can come and go. If I'm running Freenet, I may
24 simply turn off my computer. The strangers that I'm connected to
25 will, their software will go out and find another person to

1 replace me with. It's a natural churn of the network, this
2 coming and going.

3 Q When might someone come and go off the network?

4 A As I said, they may turn off their computer. They may turn
5 off the application. Anything like that, for example.

6 Q Now let's talk about if I'm a user on Freenet and I want to
7 upload a file into the network. What type of files can someone
8 upload into this Freenet network?

9 A Typically, images, movies. You could upload sound files.
10 Anything that generally can be stored on your computer.
11 Collections of images, collections of movies. You can actually
12 upload very simple websites into Freenet to be downloaded by
13 others. Not very advanced websites, but very simple websites can
14 definitely be supported by Freenet.

15 People have built applications essentially on top of
16 Freenet. So there are types of bulletin boards and messaging
17 systems, e-mail like systems, kind of group, group bulletin board
18 systems, things like that.

19 Q How does a user upload one of those files into Freenet?

20 A So if I have a particular file on my computer that I'd like
21 to upload into Freenet, the program tries to make this as easy as
22 possible. I would essentially click on the right button, locate
23 the file I'm trying to upload on my computer. Freenet does a lot
24 of the work behind the scenes. And then what's returned to the
25 user is a kind of receipt, a password. And later, with that

1 password in hand, they or another user could retrieve the same
2 file that was inserted.

3 Q So you said after you insert a file, you receive a
4 password-type thing. Give me an example. Like what does that
5 look like?

6 A It's a long string, a long collection of numbers and letters
7 and punctuation. It's not very readable. It's not
8 pronounceable. But it's very recognizable. It might be, say, 80
9 to 100 characters long. And it looks like a random series of
10 letters and numbers. Really, it's an identifier for the content
11 that you've provided. It's a password that anyone who possesses
12 it could download the same file. Very similar to a URL for a
13 website.

14 I can tell you about GitHub, but if you really want to
15 go there, I have to give you the URL address. So Freenet is
16 analogously working in that way. It's just not as user-friendly.

17 Q Now, you had mentioned kind of some things happen behind the
18 scenes after the user clicks on "upload." What's actually
19 happening behind the scenes with that file?

20 A So what the software will do when I, for example, give it a
21 file to insert into the network, behind the scenes it will take
22 the file -- and this is very different than many other parts of
23 the internet -- but it takes the file and it breaks it into very
24 small pieces or blocks, they're called. These pieces are
25 essentially randomly distributed around the network. It's, each

1 piece is given to a randomly selected internet peer running
2 Freenet somewhere around the world.

3 So I might take a file and, for example -- or I should
4 say Freenet might take a file and break it into a thousand
5 smaller pieces and then place those pieces randomly among the
6 people who are running Freenet on their own computer.

7 I should add a detail, that after it breaks up the
8 file, it encrypts each little piece so that when it's given to
9 this remote person, they actually don't know what they have.
10 They just have this little encrypted piece of it.

11 What the password enables someone to do is to
12 re-collect those pieces, decrypt them, and reconstitute the
13 original file.

14 Q Now, you said that the little pieces are stored out there on
15 other people's hard drives. When you download Freenet -- and I'm
16 going to show you Page 13 of 21 -- do the users have to agree to
17 offer a portion of their hard drive to do that?

18 A Yes. This is the configuration screen that you would see
19 upon installing and running Freenet for the first time. And it's
20 asking you -- this is part of the peer-to-peer aspect of Freenet
21 -- as a peer, please select a size for your data store. And it's
22 telling you we recommend between 1 gigabyte and 20 gigabytes of
23 your hard drive be used to store parts of files, pieces of files
24 that were inserted by other people into the network.

25 Q Now, you mentioned that if you have that password, a user

1 could retrieve a file, is that correct?

2 A That's correct.

3 Q Let's talk about retrieving files. What are some ways that
4 individuals can locate these passwords?

5 A Well, the password, although, as I said, it's not easily
6 pronounceable, it's this long string of, long series of numbers
7 and letters, it's not that long. It's something you can post to
8 a bulletin board. You can e-mail it to a friend. There's a
9 number of ways that you could locate these passwords, publicly
10 posted by other people. And with the software running and the
11 password in hand, you can download those files.

12 Q Now, you had mentioned earlier that there could be like a
13 message board feature or websites within Freenet. Can you find
14 passwords on those as well?

15 A If they're publicly posted, yes.

16 Q I'd like to show you an example. This is Page 14 of 21.
17 Let's talk about if you would like to find one of these passwords
18 on a website within Freenet. What are we looking at here?

19 A So previously we've seen, we started with screenshots of
20 what windows shows you while you, while you install Freenet.
21 Then we saw this launching of Freenet. And the first thing we
22 saw is we had to choose a security mode. Then we saw that, for
23 instance, you would configure the amount of data that you're
24 volunteering to Freenet. And then you're ready to go.
25 Eventually, you would get to this screen right here.

1 So this is the top of, of what Freenet shows you. And
2 it looks like an old '80s style website. Right? Not very fancy.
3 But those are all clickable links.

4 So we can see right at top, for example, it's offering
5 you right away go to Enzo's index, or the filtered index, or
6 nerdageddon again. Exactly what you're circling. And those
7 underlines are links that you can click and Freenet would show
8 you another site that would list other places to go in Freenet.
9 There's no -- the reason it looks this way, there's no access to
10 Google. You can't go to Google and make use of Google.
11 Everything's internal to Freenet. It's its only little community
12 of files that have been placed there by other people. It's like
13 a little library, community library, and you can only borrow
14 books from that library, even though other libraries exist.

15 Q I'm going to show you Page 16 of 21. If we clicked on one
16 of the links you just mentioned, is this what we would see?

17 A Yes. Again, Freenet's a little different. It's a bit, I
18 almost would say, a lot slower than the typical internet. It's
19 so slow that it actually will tell the user right at the top
20 there, it says Freenet is downloading the page you requested. In
21 a way it's saying, don't worry, I know I'm slow, this is what's
22 going on.

23 So we can see here that it's been 13 -- no. In fact,
24 28 seconds so far. It says time elapsed. 28 seconds. It
25 estimates 13 seconds to go. And there's a progress bar there in

1 green. If this was a live demonstration, that progress bar which
2 currently says 15, then in parentheses it says 68%, it would be
3 marching all the way to the right. Then once that happened, we
4 would see the next, we would see what we were trying to download.
5 In this case, we clicked on one of those index sites.

6 Q And I just want to draw your attention to the bottom of this
7 page that I'm circling. Again, is this an example that you
8 discussed before, how Freenet is constantly warning its users
9 about being on a low security on the open net?

10 A That's exactly what I referred to before. So here you can
11 see we're up and running Freenet. We're waiting for something to
12 download. Freenet is helpful enough to tell us that we're still
13 in this low security mode.

14 Q Now, let's say, for example, we successfully download the
15 website page. Is this an example of that?

16 A Yes. That's an example. And so we can see a list of, of
17 home pages. In other words, websites that are internal to
18 Freenet of different people. Some of these are the developers.
19 As I scan down to the bottom, we can see near the bottom it says
20 little angels, photos of nude minors. Right below that, Lolita's
21 heaven, again, photos of nude minors. This is one of the, this
22 is once click away after you install Freenet, essentially.

23 Q Let's say we click on Lolita's heaven. Okay?

24 A Okay.

25 Q Is this an example of the actual website that would come up?

1 A Yes. So this is what you would see using Freenet. Looks
2 like a typical website. Not very fancy, but definitely a
3 website. And so some of this is, those black bars are obviously
4 not part of Freenet. Those were put there as part of the
5 exhibit.

6 Q Now, I'm going to show you Page 19 to 21, which would be the
7 bottom portion of that website if you were to scroll down. What
8 do we see here?

9 A Could you perhaps zoom in a little bit on the bottom?
10 That's a little better.

11 So at the bottom of the website, the website developer
12 has sort of, for convenience, provided these passwords that I
13 spoke of before. So this is perhaps a more -- these examples
14 make it easier to understand what I was referring to before.

15 So we can see, in this case, they all start with a
16 C-H-K, and then the "at" symbol. Then we can see the long
17 sequence of numbers, letters, and some punctuation. And then a
18 comma, and then another long sequence of numbers, letters and
19 punctuation. And then some text we can finally read at the end
20 there. It says: Lolita's heaven dash Abigail.RAR.

21 An RAR file is a collection of images that have been,
22 well, it's a collection of images that are -- it becomes just a
23 single file.

24 So you may have heard of a zip file. That's a
25 collection of documents or images. An RAR file is just the same

1 thing. I'm sorry. Go ahead.

2 Q So let's say, for example, I take that key and I want to, I
3 want to retrieve that file from Freenet. How do I go about doing
4 that?

5 A Well, so what, the easiest way to do it, or one of the ways
6 to do it, anyway, is to, with your mouse highlight that long
7 sentence. And that's what we saw in the last exhibit. That blue
8 is because the mouse had highlighted that. Then you could copy
9 it, as in copy and paste. You can copy it into your computer's
10 memory.

11 Then there's another screen available on Freenet where
12 you could paste that unpronounceable, long password, give it to
13 Freenet, and then it will start to download the file for you if
14 you were to click the right button.

15 Q I'm showing you Page 20 of 21. Is this what you are
16 referring to, where you could cut and paste that password to
17 download the file?

18 A Exactly. So it's a little hard to read. But we can see, we
19 can see it's the same key that was highlighted in the previous
20 slide. CHK at, a large number of numbers, letters and
21 punctuation. Then at the end there we see, again, Lolita's
22 heaven dash Abigail dash RAR. And then the download button at
23 the very bottom.

24 Q If a user clicked "download", which you see at the bottom
25 left -- I'm going to show you Page 21 of 21 -- is this the next

1 screen that they would see?

2 A Yes. We can see that Freenet is attempting to locate this
3 file and make some progress on it. It's been about 30 seconds.
4 It's quite slow. And you would wait. And then eventually, if
5 successful, the file would be available on your computer
6 unencrypted and available for viewing.

7 Q And you had mentioned there may be other ways to download
8 these passwords as well. What's another way you can download a
9 password on Freenet?

10 A Well, in the site we were looking at, presumably the little
11 pictures, little thumbnails were clickable. Possibly, you could
12 also be, as I mentioned before, e-mailed one of these passwords.
13 There could be a bulletin board where someone would see, hey,
14 here's a password that I like. Maybe you'll like it, too.

15 You could request these passwords from other users who
16 might say, oh, I know that one, let me give it to you.

17 So any sort of communication makes this relatively
18 easy.

19 Q And then, of course, once the download is completed, can the
20 user open the file and see whatever it was they were trying to
21 retrieve?

22 A Yes. There's no other, typically, there's no other
23 decryption or things like that that are required.

24 Q Your Honor, at this time I was informed that the defense may
25 need a restroom break. Can we break a break?

1 THE COURT: Yes. We can take a break.

2 (Recess at 11:00 a.m. Resume at 11:13 a.m.)

3 THE COURT: Okay.

4 BY MS. SHOOP:

5 Q Now, Dr. Levine, we just went through the process of when a
6 user downloads a file. I want to talk about what actually
7 happens behind the scenes after the user clicks "download."
8 Okay?

9 A Okay.

10 Q Can you describe what takes place?

11 A So behind the scenes, after the user tells Freenet it would
12 like the file associated with a particular password that we
13 discussed before, a few things are going to happen. So the first
14 thing that's going to happen is that software is going to get,
15 it's going to retrieve from the network the list of pieces that
16 were previously inserted and essentially scattered around the
17 network. So with that in hand, the software will then try to
18 then retrieve each of those pieces.

19 So for each, each piece, the computer's going to send a
20 signal to its stranger that it's connected to. It's going to say
21 do you have this piece? And that stranger is going to say either
22 I have it or I'm going to ask the strangers that I'm connected
23 to.

24 Now, to be clear, there's no user typing anything.
25 These aren't messages that go back and forth between the two

1 users of the computers. It's just signals between the pieces of
2 software that are running on the two computers.

3 Again, we have -- the software has this list of pieces
4 it needs to retrieve for each piece. The software has an
5 algorithm that lets it decide which of my strangers is the best
6 to start with. Let me ask this one stranger next to me via this
7 signal. If they have it, they're the intended recipient. If
8 they've it, they'll reply with it. And if not, they'll ask their
9 friends and they'll ask their friends.

10 Now, at some point this asking of strangers upon
11 stranger upon stranger, hop upon hop upon hop, will stop because
12 it's crazy to keep going on forever. And if nothing is found, a
13 not-found message will be sent, a not-found signal will be sent
14 to the computer that made the original request. But if it is
15 found, then the computer can reassemble the inserted file, first
16 decrypting each piece, reassembling the original file, and then
17 presenting it to the user.

18 Q Now, you mentioned when the signal goes out from the user to
19 these strangers. Is there any information connected to that
20 signal?

21 A Yes. So we saw already that when we're connected to these
22 strangers, they know our IP address. We know their IP address.
23 When the request goes out, the signal contains the exact piece or
24 block that we're looking for. The signal also gives a notion of
25 how far this request has traveled so far. We know the time and

1 date. Those are the essential bits of information that are
2 included with the request.

3 Q Now, when a user tries to retrieve all of these little
4 pieces, are there times where that, that's not possible?

5 A Yes. Your computer is sending a signal to the stranger next
6 to you saying do you have this piece? Again, no typing. It's
7 just a computer signal. If they don't have it, they'll ask their
8 stranger peers, and so on. And eventually, no one might have it,
9 at which point a not-found message would be sent back to the
10 original requester.

11 Q So now let's turn our attention from the process to the law
12 enforcement investigation into this peer-to-peer software. While
13 studying Freenet, did you become aware that people were using
14 Freenet to trade child pornography?

15 A Yes.

16 Q How did you become aware of that, Dr. Levine?

17 A I believe law enforcement first told me about it. But it's,
18 I've been studying peer-to-peer file sharing networks for over a
19 decade, and they all contain child pornography trafficking. So
20 it was of no surprise to me.

21 Q And when law enforcement reached out to you, did you attempt
22 to assist them in any way?

23 A Yes.

24 Q Can you tell us what you did to assist law enforcement?

25 A So in summary, there were two outcomes of our, of our

1 assistance to law enforcement. I say "our." As I said, I'm a
2 professor and I have research staff that work with me.

3 The first outcome was a tool to be used by law
4 enforcement for the forensically sound investigation of child
5 pornography trafficking on Freenet. This tool has a number of
6 important characteristics. It's a simple modification of the
7 Freenet software, which, as I mentioned before, is open source,
8 freely available for anyone to read and modify and make changes,
9 assuming they know Java.

10 The changes we made were limited in a very particular
11 way. The changes essentially write down for an investigator the
12 information that the software already has in its normal
13 execution. So there is no extra messages. There's no extra
14 signaling. There's no, there's no probing of the network.
15 There's no special features. It's just information that anyone
16 running the Freenet software has already, their computer has
17 already, and we simply write it down.

18 We only write down information that's contained in
19 messages for which we are the intended recipients.

20 Q So let's talk about that. So let's say, for example, I am
21 on Freenet and I'm connected to 10 strangers. One of those
22 strangers happened to be a law enforcement computer that's
23 running this modified version of Freenet. And I want to download
24 a file. And I send a signal from my computer to their computer.
25 What information does this acquire?

1 A So since you're connected to a stranger who happens to be
2 law enforcement, you, in the process of requesting, taking a
3 password and then the software you're running requests the pieces
4 that are associated with that password, some of the requests will
5 go to each of the strangers you're connected to. And so,
6 therefore, some of the requests will go to law enforcement. And
7 what they'll contain is the exact piece that you're looking
8 for -- uniquely identifiable, better than DNA -- the exact piece
9 you're looking for, the current date and time, of course, your
10 current IP address, and this notion of about how far you've,
11 about how many hops of strangers you've traveled to locate this
12 information. That information's required because at some point
13 we want to stop looking. But that's the information that would
14 be there.

15 Another critical part of this law enforcement tool is
16 that it has already a list of blocks that are of interest to law
17 enforcement. So at some point law enforcement visited, say, one
18 of the bulletin boards on Freenet that are, that are labeled as
19 discussing child pornography, toddlers and infants, Lolitas and
20 so on, named Lolitas and so on. So they'll visit these boards.
21 They'll see publicly, just like anyone else, these passwords. We
22 saw an example of that in the exhibit.

23 What they can do ahead of time is learn the exact
24 pieces that are associated with that password that are on the
25 network. And so with that in hand, running the software as each

1 request comes from you as a requester of the pieces for this
2 password of interest, the software can say, aha, that's a piece
3 that I can uniquely identify as being part of this list of files
4 of interest that I'm aware of previously as being associated with
5 child pornography trafficking.

6 At that point, the software would record the
7 information that I mentioned before. And, essentially, at the
8 end of the day, the investigator is left with a nice record of
9 the requests that, since you said "you" before, you as the
10 requester have sent to me, the law enforcement known.

11 I know that they're associated with the particular
12 password. I know that these blocks are -- I mean, I know that
13 for sure. I know the number that I've received. I know the time
14 frame start and last time that these requests were sent. I know
15 that they're intended only for me.

16 And then the next stage of the investigative process
17 would be for law enforcement to then retrieve that file
18 themselves because they should visually confirm that, in fact,
19 it's not only a file of interest, it's, it is child pornography
20 that was requested by the stranger next to me.

21 And then using an algorithm, they can determine next
22 stops.

23 Q Before we talk about the algorithm, let me ask you this, Dr.
24 Levine. You mentioned that, in the beginning of your testimony,
25 this is open source software so anyone can modify it, is that

1 correct?

2 A That's correct.

3 Q It's all publicly available?

4 A I'm publicly available and intended for volunteers to join
5 and modify. It's a volunteer project.

6 Q And let's say I sent a request to a peer that was not
7 running this modified version. The information that you just
8 described, would that same information go to that individual as
9 well?

10 A Yes. This is only information that is already sent to every
11 peer all running Freenet. Some of it we saw is displayed in the
12 previous exhibit. Some of it is displayed already to the user.
13 Others is not displayed, but is held and used by the software.
14 Our version for law enforcement simply writes it down,
15 essentially.

16 Q And let me ask you this. You originally, you had stated
17 that when you connect to these strangers as a user, that's
18 random, and the software does that automatically?

19 A That's correct.

20 Q Does the modified version also do that the same exact way?

21 A It does not modify the existing process that Freenet has for
22 connecting to strangers. So the software doesn't, it's not an
23 option in the software to target a particular individual.

24 Whoever the -- for law enforcement, when they're running that
25 software, whoever the software happens to connect to, what

1 other -- sorry -- whatever remote strangers the software happens
2 to connect to, whatever remote strangers happen to connect to law
3 enforcement, that's whose information is recorded, is logged
4 about.

5 Q Now, which -- we had talked about two operational modes:
6 The open net, which is low security; the darknet, which is high
7 security. Which mode --

8 MR. FEIN: I'm going to object, Your Honor. That
9 wasn't quite the evidence. There are various security methods
10 for open net and there are various security settings for darknet.
11 Darknet is generally more secure. But the evidence wasn't that
12 one is low and one is high.

13 THE COURT: Overruled.

14 THE WITNESS: Can you rephrase the question, please?

15 BY MS. SHOOP:

16 Q Yes, sir. We talked about, there's two operational modes,
17 open net, darknet, which I believe is labeled low security, high
18 security. Which one of those modes do you run this modified
19 version on?

20 A The modified version recording this information that's
21 available, anyway? Our modified version runs only on the low
22 security, open net mode.

23 Q Now, with that information that you just described that the
24 modified version is collecting, does Freenet warn its users that
25 someone may do that?

1 A Yes. There's several examples of that. We saw already in
2 the exhibits that were put on the screen previously, that upon
3 install, there's the warning. We saw that the bottom of the
4 browser screen, it reminds the user that they're low security
5 mode. The Freenet website has a lot of documentation. There's a
6 help page available for users that contains an enormous amount of
7 information. There's a large and detailed section on
8 vulnerabilities to Freenet. In particular, one of the paragraphs
9 is labeled correlation techniques. And what it says is that if
10 you're connected to a stranger, if that stranger knows ahead of
11 time the password, the file, the password that you're requesting,
12 if they receive, just by being your stranger, by recording the
13 proportion of requests, the number of requests you receive, and
14 they know which key you're looking for and how many, how many
15 hops, which Freenet tells you, anyway, how many hops the messages
16 have traveled, then that third party can detect that you are the
17 requester of these files.

18 It's been up there for at least three years. It
19 exactly describes the technique that we've been doing.

20 Q And is that publicly available?

21 A That's publicly available on the website. As I said, been
22 available for at least three years. In fact, that's not the only
23 vulnerability they list. I mean, it goes on for a while.

24 Q So let's talk about the next step that you mentioned, an
25 algorithm. So you said that you assisted law enforcement in two

1 ways. We talked about the first one. Let's talk about the
2 second one.

3 When law enforcement has that information, what can
4 they do with it?

5 A Okay. So as I mentioned, there were two outcomes of our
6 participation with law enforcement. The first was this law
7 enforcement version of Freenet. The second was a paper that I
8 mentioned before that was peer-reviewed and is now publicly
9 available, that describes a method for taking that information
10 that the software writes down and then using it to determine
11 whether the stranger next to you is indeed the requester of a
12 particular file or -- there's only one other option -- they're
13 merely relaying the request of some other user.

14 And just as the Freenet website describes, with the
15 information in hand it can make that determination.

16 A really critical part of that peer-reviewed
17 publication is that there's an evaluation of the technique. So
18 we evaluate both its true positive rate and it's false positive
19 rate. It is, it has a very high true positive rate, as we found
20 in simulations of Freenet. And we found it has a very low false
21 positive rate in an evaluation of using six weeks of real Freenet
22 traffic.

23 Q And so this method that you've assisted law enforcement
24 with, is it, is it a way for law enforcement to take that
25 information and determine if somebody is likely that original

1 requester versus the person passing on the request?

2 A Yes.

3 Q Did you have this technique evaluated?

4 A Yes. I mean, we evaluated it. That's the main point of the
5 paper, is to provide publicly our method of evaluation for others
6 to view.

7 Q And how do you know that the method works?

8 A Well, so we, as I said, we used two different methods to
9 evaluate our investigative approach. We constructed a simulation
10 of Freenet, recreating its routing algorithm and other aspects of
11 how Freenet works. This is very standard in my field. It's how
12 I've been doing things, and everyone else in my field, for
13 decades.

14 Then we used that to evaluate its true positive rate.
15 Then we took actual traffic from Freenet, as I said, for six
16 weeks, and we evaluated its false positive rate. And so, and so
17 that's what the paper details.

18 Q And, Dr. Levine, you said that that's a very standard method
19 of evaluating techniques in your field?

20 A Both are standard methods I've used for decades, as have
21 other people in my field.

22 MS. SHOOP: Your Honor, may I have one moment?

23 THE COURT: Yes.

24 MS. SHOOP: Your Honor, that is all we have at this
25 time.

1 THE COURT: Okay. Cross.

2 CROSS EXAMINATION

3 BY MR. FEIN:

4 Q Thank you, Your Honor. Good afternoon, Doctor.

5 A Good afternoon.

6 THE COURT: I think it's still morning. I think it's
7 still morning.

8 Q I think that depends where you are. Correct, Your Honor.
9 I'd like to go over some of the matters you testified on direct.
10 Can you see the exhibit that is displayed?

11 A Yes, I can.

12 Q And this is part of Government's Exhibit M-1, is that
13 correct?

14 A I'm not familiar with the exhibit numbers. But it's the
15 slide I saw before.

16 Q Fair enough. And it's -- do you remember being asked about
17 various security settings?

18 A I do.

19 Q Okay. And if I understood your testimony correctly, you
20 said that the security settings, or the warnings that you're
21 viewing right now on Government's Exhibit M-1, have been in place
22 since 2012?

23 A I believe I said three, I believe I said three years.

24 Q I thought you said about six years.

25 A Did I say six? Yes, six years.

1 Q But I don't know what the answer is so I'm asking you. Is
2 it six or three?

3 A I believe it's six.

4 Q And how long has Freenet been available?

5 A I'm not sure of the exact date when they first made the
6 software available for users to use.

7 Q Do you know which version Mr. Hall was using?

8 A I do not.

9 Q So you don't know if this was the security display that was
10 available at the time that Mr. Hall downloaded and used Freenet,
11 correct?

12 A Well, I do know that Freenet auto-updates its version for
13 users so it's very likely that his version was one of the more
14 recent ones because of the auto-update. But you're right, I
15 don't know for sure.

16 Q So the question is you don't -- the answer is you don't
17 know, correct?

18 A I don't know.

19 Q What I'm showing you now is also a part of Government's
20 Exhibit M-1 and it's titled Protection Against a Stranger
21 Attacking You Over the Internet. Do you recognize this exhibit?

22 A I do.

23 Q Do you recall your testimony earlier today about this
24 exhibit?

25 A I do.

1 Q I believe you said that the warnings displayed here have
2 been in place since 2011, is that correct?

3 A They've been in place for seven to nine years, each of the
4 warnings.

5 Q Okay. So earlier you said seven. So now it's seven to nine
6 years?

7 A I said at least seven earlier, I believe.

8 Q Very good. And again, you have no idea if this was in place
9 at the time Mr. Hall downloaded the version of Freenet that he
10 uses, correct?

11 A I don't have firsthand knowledge of that, no.

12 Q Also, I'd like to ask you a couple of questions about this
13 document. Earlier you testified that there's a setting that's
14 denoted low. Correct?

15 A Yes. I can see it on the screen.

16 Q Okay. And beneath that it says: It may be quite easy for
17 others to discover your identity, exclamation point, correct?

18 A I see that.

19 Q And below that, though, it says normal, correct?

20 A I see that.

21 Q And normal's also available to open net users, correct?

22 A Yes.

23 Q And normal says: I live in a relatively free country but I
24 would like to make it more difficult for others to monitor my
25 communications. Correct?

1 A I see that.

2 Q I understand you see it. But am I right? I mean, is that
3 correct that it says that?

4 A Yes.

5 Q Okay. So an open net user could choose low or choose
6 normal, correct?

7 A Correct.

8 Q You don't happen to know what Mr. Hall's settings were, how
9 he had arranged his Freenet on his computer, correct?

10 A Among these two options within open net? No, I don't know.

11 Q So on the display now is also part of the Government's
12 Exhibit M-1. And this is labeled A New Stable Version of Freenet
13 is Available. My Open Net Peers. Do you recognize this exhibit
14 from earlier today?

15 A I do. Actually, that's an example of the auto-updating
16 feature. I recognize it.

17 Q Very good. And one of the reasons I believe the government
18 or the primary reason the government displayed this to you was to
19 visualize for the Court how IP addresses of individuals to whom
20 you're connected are exposed. Is that correct?

21 A Yes.

22 Q That may have been phrased poorly. Forgive me.

23 A Yeah.

24 Q Yeah. A user of Freenet can see the IP address of those
25 individuals to whom he's directly connected, correct?

1 A Correct.

2 Q And if there's an individual to whom that user was formerly
3 connected, they might have access to that IP address, too,
4 correct?

5 A They might.

6 Q But individuals to whom a user has never been connected,
7 those IP addresses are not available, correct?

8 A I don't believe so.

9 Q So, and we'll return to this later. But in the retrieval
10 process, I may be retrieving files that connect to users that I'm
11 not directly in contact with, correct?

12 A You mean you may be retrieving files, pieces from users
13 you're not connected to? Is that the question?

14 Q Yeah. That's much better phrased.

15 A Yes.

16 Q The individuals returning blocks to me as a user, if I'm
17 trying to download a file, may be individuals who are far removed
18 from the users I'm directly connected to?

19 A Yes.

20 Q And the IP addresses of those individuals I will not have
21 access to?

22 A If you have not connected to them, that's correct.

23 Q I'd like to go over the processes that you discussed with
24 the government a bit more slowly. You talked about the upload
25 process and you mentioned various ways to upload files. And you

1 indicated that once somebody uploads a file, there's a password
2 that's assigned to a file, correct?

3 A I've been calling it a password.

4 Q And Freenet refers to that as a key, correct?

5 A That's correct. It's the same, the same term.

6 Q Same concept that's being denoted?

7 A Yes.

8 Q And a key, a key operates like a table of contents, is that
9 fair to say?

10 A The key can retrieve a table of contents for you, yes.

11 Q That would be a manifest key?

12 A That would be a manifest key would return that manifest.

13 Q Okay. So you have your key, which is kind of what you would
14 call a password?

15 A That's correct.

16 Q And that key, in turn, relates to what's called a manifest
17 key, correct?

18 A Yes.

19 Q Is there a better word to use?

20 A That's fine. I'm following you.

21 Q Okay. And the manifest key can operate as a table of
22 contents you indicated, correct?

23 A Correct.

24 Q And that table of contents list the blocks that comprise the
25 entire file, correct?

1 A That can be used to recreate the entire file, yes.

2 Q And the blocks themselves are encrypted?

3 A Yes.

4 Q Okay. And they also have hash values assigned to them,
5 correct?

6 A Yes.

7 Q What is a hash value?

8 A It's a unique fingerprint of a, of a portion of data.
9 That's an informal way to describe it.

10 Q So each block has its unique identifier, correct?

11 A Yes.

12 Q And so if I'm uploading a file, I'll get a key or a
13 password. And then there will be an automated process that takes
14 over, is that right?

15 A That's fair to say.

16 Q Okay. And that automated process will break that file up
17 into component parts?

18 A Um-hum. Yes.

19 Q And those component parts would be blocks?

20 A Yes.

21 Q And those blocks would be encrypted?

22 A Yes.

23 Q And they'd be hashed?

24 A Yeah. They can be hashed, yes.

25 Q And every block does have a hash value assigned to it,

1 right?

2 A All data has a hash value, yes.

3 Q I'm sorry?

4 A Yes. The answer's yes.

5 Q I think you indicated those are stored diffusely throughout
6 the system, correct?

7 A Yes.

8 Q There is no central server?

9 A There is no central server.

10 Q And the individuals who are storing blocks, whether it's one
11 or more blocks, don't even know that they're storing those
12 particular blocks, correct?

13 A They don't know -- they know they're storing blocks but they
14 don't know the, they don't know the data stored -- sorry. The
15 blocks they're storing are encrypted. And so since they don't
16 have the decryption key, they can't decrypt what they're storing.

17 Q So particular blocks --

18 A Particular blocks they're storing, yes.

19 Q And those are randomly distributed throughout the system,
20 correct, the blocks?

21 A Yes.

22 Q Let's talk about downloading for a moment. So if I
23 download, I will need a key, correct?

24 A Yes.

25 Q And if I have the key, I can enter the key into the

1 software, the Freenet system software, correct?

2 A Correct.

3 Q Then through an automated process the software will try to
4 retrieve the file that corresponds to the key, is that correct?

5 A Yes.

6 Q And it will do so by sending out data streams, right? In
7 other words, my software will send out a communication, right?

8 A The software will send signals to your strangers you're
9 connected to.

10 Q And it will send out -- right -- it will send out a
11 communication to the strangers to whom I'm connected. Fair
12 enough?

13 A Fair enough.

14 Q Those communications will request the blocks that are
15 associated with the larger file, correct?

16 A Those signals are the requests for the blocks needed to
17 reconstruct the file.

18 Q And if there's anyone that I'm connected to that doesn't
19 have one of the blocks, a message, a communication will be sent
20 back to my computer indicating so, and my original message will
21 continue out through the system further to people I'm not
22 directly connected to?

23 A I don't believe the error message comes back until they've
24 also searched their strangers. But eventually, if it's not
25 found, a message would be sent back to the original requester.

1 Q Fair enough. So if I send out my original communication and
2 it goes to individuals I'm connected to, looking for blocks, and
3 some of those individuals whom I'm connected to do not have a
4 block, the message continues out through the system looking for
5 the blocks that comprise the file?

6 A The signal would continue to propagate, yes, for a time.

7 Q Right. To people I'm not directly connected to?

8 A That's correct.

9 Q The idea is that that communication continues to go out
10 until it can locate the blocks to bring them back to my computer,
11 where the file would be reconstituted?

12 A Correct.

13 Q And the way that the system, the way the software of the
14 recipient of my communication determines whether or not it has
15 that block is through the hash value associated with the block?

16 A I'm sorry. Say that again. I didn't hear you totally.

17 Q So the way that a recipient of my communication requesting
18 the file, the way that their computer determines and software
19 determines whether or not they have a block that corresponds to
20 the key or the file for which I'm looking is through the hash
21 value that's assigned to the block?

22 A Yes.

23 Q Okay. If it has, if it recognizes that hash value and has
24 it, it will return the block to me?

25 A Correct.

1 Q And that process, as I said, is an automated process,
2 correct?

3 A It's signals between two computers running Freenet.

4 Q Any individual who is operating Freenet, they don't have to
5 be doing anything at their computer to do this other than the
6 downloader or the uploader has to put in the key. Other than
7 that the entire system is automated?

8 A Yes.

9 Q The communication as a user, if I'm trying to download a
10 file, the communication I send out has various component parts to
11 it, correct?

12 A Yes. The signal does.

13 Q Okay. The signal includes, as you said, my IP address in
14 there, correct?

15 A That's standard for all messages on the internet, correct.

16 Q And if I'm requesting a file, it will include the hash value
17 of the various blocks that I'm looking for, correct?

18 A Well, each signal, each request contains one block at a
19 time. So yes. If you said it in the signal, in the singular, I
20 would agree.

21 Q Forgive me. So each communication I send out will have a
22 hash value associated with respect to the blocks that comprise
23 the file I'm looking for?

24 A Each request is for a particular block, you know, identified
25 by its hash value, as you said.

1 Q Correct. Each will also have, each communication will also
2 have an indication of the number of hops to live, that is the
3 travel distance that occurred to date so far, in the message
4 process?

5 A No. In fact, it has a count of the number of hops that it
6 can, that it can continue to go to. It's not the number that
7 have passed so far. It's the number that are allowed remaining.

8 Q To be?

9 A Yeah.

10 Q Very good. And it will also have a date stamp or a date of
11 the communication?

12 A I'm not sure if the actual signal contains a date stamp.
13 But the receiving, the intended recipient, the stranger you're
14 connected to certainly has a clock by which it can mark the
15 current time.

16 Q Very good. And the same would be true for the time? So the
17 date and time?

18 A Yeah, the date and time together.

19 Q Okay. So the communication itself would have the IP address
20 embedded in it, it would have the hash value of the block
21 embedded in it, it would denote the number of hops to live left,
22 and then on the recipient end, there might be a date and time
23 that are part of that computer's system?

24 A Yeah, at the intended recipient, yes.

25 Q Okay. And one last. Do you know how many people use

1 Freenet in the United States?

2 A Well, in our experiments, we found, we connected to roughly
3 say about 4,000 a day. And that number aligns with estimates of
4 various other researchers. And even the developers of Freenet
5 make estimates. So let's say who knows on any particular day
6 like today, something on the order of 3 to 6000.

7 Q So but my question isn't an estimate. My question is do you
8 know how many people in the United States are using Freenet?

9 A No.

10 Q Okay. Do you know how many people worldwide use Freenet?

11 A Yes. In our experiments, in our observations, we found
12 about 4,000 nodes running software in the world on Freenet at the
13 time that we ran it.

14 Q At the time you ran it. When was that?

15 A November -- November, December and January of this, November
16 of 2016 through January of 2017.

17 Q Okay. And was that a count or an estimate?

18 A That was a count. But I'm giving you a rough number. I
19 don't remember the exact, 4,217, 4,218. I'm estimating, you
20 know, about 4,000.

21 Q Very good.

22 A It's written in the paper that I referenced earlier.

23 Q Okay.

24 A That's what I'm referring to.

25 Q Okay. You indicated at some point law enforcement contacted

1 you about assistance that you might be able to provide in terms
2 of Freenet investigations, is that correct?

3 A That's correct.

4 Q When was that?

5 A I believe that was 2014.

6 Q And you indicated that you made a patch or a modification to
7 existing Freenet, correct?

8 A Not me. Someone who works for me. But my research group.

9 Q Okay. Do you prefer me to refer to them as your research
10 group or the University of Massachusetts?

11 A If you say University of Massachusetts, I'll understand that
12 you mean my research group.

13 Q So the University of Massachusetts created a patch or a
14 modification for the existing Freenet software that's available
15 publicly on the internet, correct?

16 A That's correct.

17 Q And this particular patch or modification was created to be
18 open source code that's available to the public?

19 A Yes.

20 Q And it was created using Java language, correct?

21 A Yes.

22 Q And the patch allowed for recordation of certain
23 information, correct?

24 A Information received as the intended recipient, yes.

25 Q So the patch or the modification allows a recipient of a

1 communication to record, for example, the IP address of a relayer
2 of information?

3 A The sender of that signal that was received, yes.

4 Q Is it wrong to call that person a relayer?

5 A You don't know if they're the originator or a relayer.

6 Q Correct. You have no idea, right?

7 A That's correct. So they might be, they might not be.

8 Q Precisely. So the IP address of that -- and I should stop
9 referring to -- they're not individuals. These are all
10 computers. It's all a computerized system.

11 A Computers run by individuals.

12 Q Right. Well, but as you said, it's an automated process.
13 An individual doesn't have to be sitting there, doing anything,
14 other than request to upload a file, correct?

15 A That's true.

16 Q So this patch, this modification will record for a recipient
17 of the communication the IP address of the computer that sent the
18 communication, correct?

19 A Correct.

20 Q The hash, and in our, with respect to what we're concerned
21 about today, the hash value of a block that's requested, correct?

22 A Correct.

23 Q The hops to live that remain in the communication, correct?

24 A Correct.

25 Q And the date and time of the communication?

1 A Correct.

2 Q Ordinarily, as constructed, Freenet doesn't do that?

3 A Well, as we showed before, it does display the IP address of
4 the strangers you're connected to. Ordinarily, even though this
5 information was received by your computer, it's not displayed to
6 the user.

7 Q Okay. So I'm assuming the work you did wasn't for no
8 reason. It was gathering information that makes it possible for
9 you to do this. So if ordinary Freenet did exactly what you did,
10 your work would be fairly valueless, correct?

11 A It would be redundant.

12 Q My point is simply, my point is simply you modified Freenet
13 to do something it ordinarily doesn't do, correct?

14 A Correct.

15 Q All right. And you have an advanced degree, correct?

16 A I do.

17 Q You've been doing this for, I think you said now you've been
18 a professor for 19 years?

19 A That's correct.

20 Q So you have a --

21 A Start of my 19th year.

22 Q I'm sorry?

23 A Start of my 19th year. So 18 years.

24 Q You have a fairly high degree of sophistication with respect
25 to computer matters and software engineering, I would imagine?

1 A I like to think so.

2 Q That seems a reasonable conclusion. In the data you
3 collected about Freenet and its prevalence, have you collected
4 information about ordinary Freenet users?

5 A In what sense?

6 Q Who they are, what the demographic makeup is?

7 A No.

8 Q So some people like myself are fairly unsophisticated
9 technologically. Is it fair to say that there are groups of
10 people in the populous who have a high degree of sophistication
11 like yourself, some with a moderate degree of sophistication, and
12 some with no sophistication whatsoever?

13 A In regard to computers?

14 Q Yes. And in order to create the modification that you
15 created, and like modification requires some degree of
16 sophistication?

17 A Requires familiarity with Java.

18 Q Right. So somebody who's not familiar with Java couldn't do
19 this, correct?

20 A I agree.

21 Q And somebody could be familiar with Java simply by knowing
22 the name "Java", right? You say familiarity, it's a fairly vague
23 comment, correct?

24 A Yeah. What I mean is that they have to know, they have to
25 be, they have to be a Java programmer.

1 Q Right. They have to be a Java programmer. And they have to
2 know how to manipulate source code, correct?

3 A How to modify source code, yes.

4 Q Right. So individuals who don't know how to modify source
5 code and individuals who don't know how to operate the Java
6 language, could not duplicate what you did, correct?

7 A Most likely, yes.

8 Q Do you have any idea of the general population of Freenet
9 users who have that level of sophistication?

10 A I wouldn't know.

11 Q Your Honor, would it be okay if we took -- I don't know what
12 time the Court was thinking of breaking.

13 THE COURT: 1:00.

14 MR. FEIN: That sounds fine. Thank you so much.

15 THE COURT: Or a little before.

16 MR. FEIN: Did you say -- what time?

17 THE COURT: 1:00 or a little before.

18 BY MR. FEIN:

19 Q Okay. So this process of using the patch to record this
20 data, that's part of the, part of the assistance that you
21 provided to law enforcement, correct?

22 A My group, yes.

23 Q Forgive me. At the University of Massachusetts?

24 A Yes.

25 Q Without that data, there would be no way to assist law

1 enforcement. They have to have something they're looking at to
2 further an investigation?

3 A Yes.

4 Q Where is that data recorded?

5 A Well, I'm not law enforcement so it's not something that I
6 record. So there's a law enforcement machine that keeps track of
7 that data.

8 Q Is it one machine?

9 A I'm not familiar with that. Let's call it one machine.

10 Q When you say it's a machine, what do you mean a machine? A
11 computer?

12 A It's a computer, yes.

13 Q Do you know where it's located?

14 A Pennsylvania, I believe.

15 Q Is it, so is it a single system in Pennsylvania that's
16 operating?

17 A I've never visited the location so I'm just speculating your
18 answer. So I don't know.

19 Q Does this particular computer or system of computers operate
20 simply nationally or does it operate internationally?

21 A I'm speculating. But because Freenet is international, in
22 that sense -- I really don't know. I'm speculating. So, for
23 example, I know it's typical for law enforcement to do a
24 jurisdictional restriction and focus on --

25 Q Let me see if I can help you.

1 A You're asking me things about law enforcement procedure that
2 I don't, can't tell you.

3 Q But I'm not. I'm really trying to ask you about the
4 computer system.

5 A That I don't own or run, so --

6 Q So who designed, so who designed that, who designed the
7 method of recordation of the components we discussed for that
8 computer system?

9 A Recording the actual information that was received? That's
10 the patch that we provided.

11 Q Okay. So ordinarily Freenet communications can be collected
12 from anywhere in the world, correct?

13 A Your Freenet peer can be located anywhere in the world.

14 Q So if, had the modifications you designed, do they exclude
15 communications from outside the United States?

16 A They might. I'm not sure because when they're -- when I
17 said before they are essentially written down, what I meant is
18 they are relayed to this server in Pennsylvania. And because
19 that's not in my system, I'm unaware if they are filtering out,
20 for example, information outside of certain jurisdictions. I
21 really don't know.

22 Q Are there other things about that -- so, have you ever
23 visited that system?

24 A I've never been there.

25 Q Do you know if it's modified your particular version of

1 Freenet in any other way?

2 A No. To be clear, we wrote a patch to Freenet that allows a
3 local investigator to, let's say for now, write down information
4 that it's received, the information we described --

5 Q Let's not say write down. I don't think anyone's writing
6 anything down.

7 A Let's just say that there's a collection of information
8 that's received. Right? As operating our -- so it has it. And
9 then what it does is it relays it to the server in Pennsylvania.
10 So that server can either keep the information or further filter
11 it. But it could not collect additional information. Does that
12 answer your question?

13 Q I think it does. I think if I understand you correctly, in
14 Pennsylvania there is a large computer system, is that right?

15 A I'm told.

16 Q Okay. And that computer system collects data from
17 individual law enforcement members throughout the United States,
18 is that correct?

19 A I assume.

20 Q Well, you tell, you tell me. I'm asking you.

21 A I'm told. I don't have firsthand knowledge of it.

22 MS. SHOOP: Objection, Your Honor. I believe this
23 witness is not the right person to answer these questions. He
24 doesn't know. Speculation.

25 THE COURT: He can answer.

1 THE WITNESS: I can answer, Your Honor?

2 THE COURT: Yeah.

3 THE WITNESS: I'm told that's the case. I don't
4 personally operate it. I don't have, I'm not the administrator
5 of it. I'm not law enforcement.

6 BY MR. FEIN:

7 Q Forgive me. I'm sorry. I didn't mean to speak over you.
8 When a law enforcement officer wants to make use of modified
9 Freenet, who do they contact to do so?

10 A They can contact ICAC, which I believe stands for the
11 Internet Crimes Against Children task force. ICAC. They can
12 contact, there's a group that does technical assistance and
13 training. I believe they have, I don't know, private or public
14 funding to do that. Probably both. And they can receive Freenet
15 training on how to operate an investigation properly.

16 We also, my research group assists with that training
17 but we don't, it's not us who you would contact.

18 Q So you would not provide the software patch itself? You
19 would not provide the modified Freenet itself to a particular law
20 enforcement officer?

21 A If they asked?

22 Q Correct.

23 A No. They'd have to go through training.

24 Q And you provide some of that training, or your group?

25 A My group provides, assists with that training.

1 Q Okay. How many officers have you provided training to since
2 2016?

3 A I don't know since I personally haven't provided -- well,
4 let me follow up with one further comment. I don't provide --
5 I'm not the person that provides that training when law
6 enforcement take the classes. So since I'm not the trainer, I
7 don't know how many do it. I'm also, we're not the group that
8 organizes the training. So I have no roster, I have no numbers
9 of how many people have been trained. I've been provided with no
10 figures. I have done presentations on Freenet but I wouldn't
11 call that training.

12 Q All right.

13 A That's my follow-up.

14 Q Okay. So you don't know if they've been trained, if the
15 individual officers who received training, you do not know what
16 training they received, correct?

17 A I don't know who has received the training. I'm generally
18 familiar with how they're trained.

19 Q Well, forgive me. You're not the one training them, right?

20 A I'm not the one training them.

21 Q And you haven't been there while they're trained, correct?

22 A That's right.

23 Q That's what you just told me when I asked you questions
24 about this, correct?

25 A I'm sorry. You asked me -- I'm sorry. What's your question

1 exactly?

2 Q So at this point, you don't know the training they're
3 actually receiving? You've been told by others what kind of
4 training and what the training comprises of, but you haven't
5 trained anybody yourself, correct?

6 A I'm familiar with the training materials but I myself have
7 not provided the training.

8 Q Right. So you wouldn't know how anybody has, in fact,
9 trained themselves, any law enforcement officer?

10 A I'm familiar with the training materials, but I myself have
11 not provided the training.

12 Q Okay. So let me just rephrase it and I'll move on.

13 A Okay.

14 Q You don't know if their training has been consistent with
15 the materials you've looked at?

16 A Sure.

17 Q Because you weren't there, correct?

18 A I've asked the person who did the training how it went.

19 Q I understand. But you weren't there, right?

20 A I was not there.

21 Q Okay. That's all I'm getting at. Lots of things I don't
22 know, too. There's no shame.

23 Do you know how many officers are using Freenet
24 nationally right now?

25 A I don't know.

1 Q Okay. When an officer -- since you're familiar with the
2 training, let me ask you this. And you've run some simulations.
3 When an individual is running Freenet, modified Freenet, so law
4 enforcement officer, someone from the university, they run it, I
5 take it the simulations you run are designed to simulate what law
6 enforcement would see if they were running modified Freenet, is
7 that correct?

8 A That's more or less correct.

9 Q Okay. So when you do your simulations, you're running one
10 version of modified Freenet at the time or more than one modified
11 version of Freenet at the time?

12 A That's not how it works.

13 Q Okay. So tell me how it works.

14 A In our simulations, we run what we pretend -- what the
15 simulation does is it, is it, it's a computer simulation. So in
16 the computer simulation there's, say, 5000 nodes that are running
17 Freenet. We don't actually put up 5000 actual computers that are
18 running Freenet. That's an extraordinary number of resources
19 that we'd have to cobble together. I don't have access to 5000
20 computers.

21 So we write a program that presents itself as 5000
22 Freenet users. And we take the essential parts of Freenet's,
23 we're adding algorithm that would affect the efficacy of our
24 algorithm. And we run that on a computer simulation. We have
25 requests go out. They follow Freenet's, you know, internal

1 routing algorithms and other details. And then we pretend to be
2 a law enforcement officer. The computer pretends to be a law
3 enforcement officer. And it tries to determine that if a
4 requester in the simulation is the requester, it also then tries
5 to determine if a relayer is a requester. So, in that sense,
6 it's running the tests tens of thousands of times.

7 Q So that's getting to the second part, the algorithm or the
8 statistical analysis that you have that tries to make
9 determinations about who's a requester and who's a relayer,
10 correct?

11 A Correct.

12 Q I'm still trying to focus really on the first part. And
13 that is the recordation of information. The IP address, the date
14 and time, the hash value of the block, and the hops to live that
15 remain. So if an officer is running a modified law enforcement
16 version of Freenet on a computer, how much data will that record
17 in the course of a day?

18 A I don't, I don't know for sure. I'd have to speculate.

19 Q Well, you seem to be comfortable giving me your ideas on
20 your version of software generally. What would be your estimate?

21 A Well, so for the, they join the network and they get a
22 certain number of peers. Let's say they have something like 30
23 or 40 peers. Some number of requests would come through those
24 strangers. And there's some filtering on when something is
25 testable. And so I don't know. I couldn't guess.

1 Q So how many -- so if --

2 A Depends on a lot --

3 Q I'm sorry?

4 A No. I'm sorry to talk over you. Go ahead.

5 Q No. That's quite all right. If you're running a modified
6 version of Freenet, how many requests generally are being sent
7 per second by various users that might -- let me rephrase that.
8 If I'm up and running, I'm a user and I'm on Freenet, how many
9 requests in a given minute might be transmitted through my
10 computer system?

11 A I've never looked at that so I really don't know. I would
12 just be completely speculating.

13 Q So in the tests and simulations you've run, how many come
14 through?

15 A So in our tests and simulations -- that's a different story.
16 So there, the details are in the paper. So my recollection is
17 that we ran something like 10,000 simulations. So we generated
18 10,000 Internet topologies. So we created 5000 people. We
19 connected them over a fake internet. Each one of those
20 topologies that we generated, we ran 5000 tests of our algorithm
21 and then we did that 5000 times. And I think the numbers are, in
22 fact, a little bit greater in the paper. So we tested it 10,000
23 times or more.

24 Q Yeah. So I'm clearly not making myself clear.

25 A I'm sorry for misunderstanding you.

1 Q No. It's quite all right. So what I'm trying to get at is
2 if I've got a modified version of Freenet and I'm a law
3 enforcement officer, and I'm recording data, right? I'm
4 recording data every day because that's what the law enforcement
5 investigation does. How much data am I recording?

6 A I don't know. I have never looked at that. I can't answer
7 your question.

8 Q So you have no idea how Freenet actually functions in terms
9 of how many IP addresses I may come in contact with a day?

10 A I know that. So the answer to your question depends on a
11 number of factors and I don't have access to them all so I can't
12 answer your question accurately, as much as I'd like to.

13 Q No. I understand. So that one you said you know. So how
14 many IP addresses might it come into contact with in a day?

15 A Well, so as we talked about before, there's maybe 4,000
16 users per day. So at most 4,000. However, you probably, you
17 definitely have between 10 and, let's say, over a hundred peers.
18 Those strangers will come and go. So, you know, in the low
19 hundreds. I'm just estimating here off the cuff.

20 Q So maybe the low hundreds of IP addresses. But, so that's,
21 if I'm running, if I'm a single law enforcement officer on a
22 single computer using one version of modified Freenet, right?

23 A Yeah. Depending on the number of neighbors they have
24 between, say, 30 and 50. So maybe up to hundred. Maybe 200.
25 Who knows?

1 Q Did pending on what? I'm sorry.

2 A Depending on the number of peers that you have.

3 Q Right. Okay. And if I'm running more than one computer,
4 right, so if there's, I could multiply that number out. So if
5 it's, let's say, 200 IP addresses a day. If there's multiple
6 computers running nationally, then I would multiply that number
7 out by the number of computers running, correct?

8 A Correct, although there would be some overlap.

9 Q Right. But I'm just concerned about just raw numbers.

10 A Let's say at most that.

11 Q Okay. But you have no idea how many law enforcement
12 officers are using Freenet right now?

13 A I've been told it's between 30 and 40. It goes up and down
14 depending on training and the interest of the trained officer
15 after, afterwards.

16 Q Fair enough. So if we just said -- let's pick the low
17 number. Let's say there's 30 officers a day running modified law
18 enforcement Freenet. Fair enough?

19 A Fair enough.

20 Q Okay. And the number of IP addresses they would pick up
21 would be that multiplied by maybe anywhere from 1 to 300,
22 correct?

23 A At most 300. I think I said more closer to 1 or 200, but
24 sure. Ballpark numbers, those are good.

25 Q Okay. So maybe in the course of a day, maybe 3000, 3500 IP

1 addresses?

2 A Minus the overlap. But sure.

3 Q Minus the overlap, which is an unknown, correct?

4 A Yep.

5 Q Okay. And that would be 3,500 date and timestamps, correct?

6 A Yeah.

7 Q Same with the hash values?

8 A Um-hum.

9 Q Okay. So that material would then be recorded, right?

10 That's saved. It's copied?

11 A If it's related to files of interest.

12 Q We'll get to that in a second. So that data is copied,
13 right?

14 A Yes, if it's related to files of interest.

15 Q And we'll get to that in a moment.

16 A Okay. I mean, it's an important --

17 Q I understand. But that's, but we were saying -- so forgive
18 me. Let me just take a step back then. You said if I'm an
19 officer, I've got that many IP addresses coming through. Forgive
20 me. So I see what you're saying. One of the important pieces of
21 information would be the hash value, correct?

22 A Um-hum.

23 Q And the hash value is an indicator that this piece of this
24 request that's coming through this communication is or is not
25 related in some way to a known item of child pornography?

1 A Yes. That's one of the conditions. There's others.

2 Q Okay. And that's because the hash value is a unique
3 identifier, correct?

4 A Correct.

5 Q It's telling you this is the content that's at issue that
6 we're interested in?

7 A It's telling you it's seeking this content.

8 Q Correct. Okay. So out of those 3000, maybe 3500, data
9 streams of communications, the information we've discussed is
10 there: Date, time, hops to live, hash value, and so on. A
11 certain portion of that is recorded because it's determined to be
12 of interest to law enforcement because of the hash value
13 associated with the request?

14 A Yes.

15 Q What that number is we don't know?

16 A I don't know personally.

17 Q But that information is recorded, right?

18 A Um-hum.

19 Q Where is it recorded?

20 A It's recorded in one of these computers we discussed before.

21 Q Like the Internet Crimes Against Child task force, or just
22 an individual law enforcement officer, or maybe both?

23 A It's definitely recorded at ICAC. I expect it's remaining
24 at the individual law enforcement, but I don't know for sure,
25 actually.

1 Q Okay. And then at some point somebody will review that
2 copied data, correct?

3 A Um-hum. Yes.

4 Q Will somebody review it personally or through an automated
5 process?

6 A Well, we're already talking about an automated process,
7 right? The check of the requested block against files of
8 interest is automated. There's a further check that, you know --
9 for instance, one request alone is, is not a test, is not
10 sufficient to run the test. Two requests separated by three days
11 is not sufficient to run the test. So there's other filters.

12 But after the end of the automated process, someone
13 would review that information.

14 Q Okay. So just to get this straight. So there is a process
15 that you've used to modify Freenet or -- forgive me. There's a
16 process the University of Massachusetts used to modify Freenet?

17 A Um-hum.

18 Q That process will copy data from Freenet, correct?

19 A For which it's the intended recipient, correct.

20 Q I will get to that. But it does copy information from
21 Freenet, correct?

22 A Correct.

23 Q But it only copies information if it's got a hash value
24 that's connected to a known piece of child pornography, if it's
25 got the -- and it includes with that the date, the time, and the

1 hops to live?

2 A Correct.

3 Q Who developed the process that distinguishes between the
4 hash values that relate to content related to child pornography
5 and the hash values that do not?

6 A Well, I think a number of people. I mean, that's one of the
7 main functions of law enforcement. It's not something that I can
8 do.

9 Q But there's a piece of software that is running that, doing
10 that function, doing that work, correct?

11 A Um-hum.

12 Q You didn't develop that?

13 A Not personally.

14 Q Okay. So let's take one step back. I'm sorry. I know this
15 get tedious. But it's so hard for me to understand that I want
16 to make sure it's clear on the record.

17 Users out -- Freenet users are sending communications
18 to one another, correct?

19 A Signals to one another, correct.

20 Q Signals. Law enforcement has a modified version of Freenet
21 that's inserted into the Freenet software system network?

22 A Joined, yeah. Yes.

23 Q The signals that come through are gathered by law
24 enforcement?

25 A Some of the signals, yes.

1 Q These signals could be coming from anywhere in the world or
2 the United States. Who knows where they're coming from?

3 A It's possible, yes.

4 Q There's maybe 3,000 signals a day coming through?

5 A Maybe.

6 Q Those signals are separated into two groups, we'll say,
7 those that have hash values that relate to child pornography,
8 those that do not?

9 A Yeah. Those that are of interest and those that do not.

10 Q And those are based on the hash values associated with the
11 blocks that are part of the Freenet system, that are out there --

12 A Yes.

13 Q -- stored on data store. The communication -- there's a
14 piece of software that someone has designed, you don't know who,
15 that separates out those two classes of data, correct?

16 A I don't know exactly who wrote that line of code, no.

17 Q Right. The class of data that includes the hash values that
18 relate to child pornography, that is recorded?

19 A Yes.

20 Q That's recorded using a modified version of Freenet that you
21 helped create? Or your, the University of Massachusetts, someone
22 there created?

23 A Yeah. Only reason, the only reason I'm hesitating is
24 there's two pieces to this. There's the local law enforcement
25 piece, and then it gets sent to a server. And there it gets

1 muddier who wrote that. I mean, it's an ICAC server. I don't
2 own it. So in general, yes. But there's some --

3 Q Either way, this data is recorded?

4 A Yes.

5 Q One is it's a subject of interest by virtue of the hash
6 value, which is an indicator of the authenticity of the block,
7 the content. Then that's recorded. That data's recorded?

8 A Yes.

9 Q And it's recorded in realtime?

10 A Yeah. Yes.

11 Q Subsequent to that recordation, somebody reviews this
12 material either through an automated process or manually? I'm
13 assume it's an automated process.

14 A Well, at some point, there's a human involved.

15 Q Okay. So what would that next step of review be?

16 A Well, so as part of the -- this relates to what I said
17 before. So as a law enforcement officer, you would look at some
18 of these results. Maybe some of them you did yourself. Some of
19 them you might consider tips from out-of-state law enforcement to
20 your own state and so on. And then you would follow the rest of
21 the investigative process.

22 So it includes, for example, downloading the original
23 file yourself to visually inspect it and ensure that, before I
24 said file of interest, but now you need to know particularly that
25 it's child pornography, for example.

1 Q Let me, because I think I, something else I need to clarify,
2 too. So the class of data that you've recorded -- the class of
3 data that's recorded, that is the class of data with hash values
4 that relate to child pornography, that entire class, we'll
5 assume, 3000, 3500 various requests, include people who are
6 simply relayers of information and requesters of information,
7 correct?

8 A I'm not sure. I mean, the whole purpose of the system is to
9 focus on those who are requesters.

10 Q Right. But at some point you don't know who the requester
11 is, right?

12 A Yes. It is a statistical test.

13 Q So at the time the data is recorded, the data consists of a
14 class of individuals who comprise relayers and requesters. And
15 subsequently, you're going to try to determine out of that class
16 who are the requesters?

17 A No. That's part of the automated process.

18 Q Correct. So the recordation, in the first instance, is just
19 a recorder of class of people whose communications contain hash
20 values related to child pornography?

21 A Um-hum.

22 Q Some of those people may be innocently relaying that
23 information, some of those people may be nefariously requesting
24 it?

25 A Yes.

1 Q At that point it's not known, right. You've just got the
2 pool of data?

3 A Yes.

4 Q Subsequent to that, there will be a search of that data
5 using the software to determine statistically on a probabilistic
6 determination who the requester is?

7 A Yes.

8 Q Okay. But right now we've got this pool of data. Okay. Do
9 you know how often that data is reviewed?

10 A No.

11 Q Okay. Do you know how often it's collected?

12 A I don't personally.

13 Q Okay. Do you presume that's a daily basis?

14 A I presume.

15 Q Right. Okay. So I think we have some idea of how that data
16 is collected and recorded. And you say it's either stored with
17 the law enforcement officer's computer system or it's stored
18 perhaps at the Internet Crimes Against Children task force in
19 Pennsylvania, and all that data is just sitting there stored?

20 A Um-hum. Yes.

21 Q And that at some point, someone has to or some system has to
22 analyze that data to make a determination, some statistical
23 probabilistic determination about which of those IP addresses
24 really relate to requesters and which simply relate to relayers?

25 A Yes.

1 Q Okay. So let's talk about this. How's that process
2 function?

3 A I'm sorry. Which aspect of it?

4 Q From the very beginning. So let's suppose I'm an officer
5 and I'm sitting at a computer and I've just got this recorded
6 data. I came in. It was recorded yesterday. And here's all
7 this data. And I want to try to run the algorithm on it. What
8 do I do?

9 A Well, there's a number of things they could do. But there's
10 a spreadsheet that's made available where the officers would
11 essentially rerun the statistical tests themselves.

12 Q How's the spreadsheet made?

13 A I didn't make it.

14 Q So you don't know anything about the spreadsheet?

15 A I've seen it. I mean, I know that it -- so the data that's
16 presented to law enforcement already runs the algorithm that we
17 presented in the paper. And then law enforcement -- so only if
18 it satisfies that algorithm will it be presented to law
19 enforcement. And then they rerun it themselves.

20 Q Well, you say there's a spreadsheet. Is the spreadsheet
21 self-generating? Does it make itself? I mean, where's it come
22 from?

23 A Law enforcement. A law enforcement officer made that
24 spreadsheet.

25 Q How would a law enforcement officer make the spreadsheet?

1 A By opening Excel, for example, and then adding entries to
2 the Excel spreadsheet in a way that mirrors or, you know,
3 correctly represents the algorithm that's in the paper.

4 Q So the data that's in the spreadsheet, where is that data
5 coming from?

6 A It comes from this computer in Pennsylvania.

7 Q Okay. And is it the data that we talked about being
8 recorded?

9 A Yes.

10 Q The hash value, the date and time?

11 A Yes.

12 Q And that's all it is?

13 A Yeah. All the pieces of information that are required to
14 run the algorithm.

15 Q Okay. So you've got these bits of information. But you
16 still have to run the algorithm, right?

17 A Well, as I said, ahead of time the algorithm is run. And
18 it's essentially only presented to the officer if the algorithm
19 would return the result that it's likely or significantly likely
20 that this is the requester. And then the algorithm is run again
21 by the officer manually with the spreadsheet.

22 Q Okay. So let's first to the first step, the algorithm being
23 run in an automated fashion, like it sounds like, is that
24 correct?

25 A Um-hum.

1 Q Okay. So step number one, modify version of Freenet
2 separates out two -- collects all this data: Time stamp, date,
3 hash value of the block, hops to live. It then segregates two
4 classes of information: That information which contains hash
5 values related to blocks of interest; that information which does
6 not contain hash values of interest. Correct?

7 A Correct.

8 Q Okay. It then, in an automated fashion, runs an algorithm
9 over the data that's of interest; that is, the data that contains
10 hash values of interest to law enforcement?

11 A Yes.

12 Q What is that algorithm?

13 A That's the algorithm that I published in the paper I
14 referenced earlier.

15 Q Okay. So what's the information, what's it doing? Let
16 me -- so the algorithm is making a statistical, is determining a
17 statistical probability, correct?

18 A Correct.

19 Q A statistical probability of who the requester is?

20 A Well, whether the stranger who's related to the request is
21 the originator of the request or whether they are a relayer.

22 Q When you say "stranger", you mean relayer, requester, or
23 stranger -- we're talking about a computer, right?

24 A I'm talking about the computer next to you.

25 Q Right. So you're trying to determine if the -- we know

1 this. The algorithm is trying to determine whether or not a
2 computer is a relayer computer or a requester computer?

3 A Correct.

4 Q Right? And it's going to run over the data that we've
5 already discussed, which I apologize for endlessly.

6 So the algorithm, to make a statistical, a
7 determination about statistical probability, is going to need to
8 rely on some variables, I assume?

9 A Yes.

10 Q What are the variables that are of importance?

11 A Well, so there's four significant variables. So I'm
12 assuming that we're starting with a collection of data that, in
13 the first place, was filtered correctly. And, for example, I
14 gave this example of it can't be one request one day, another
15 request five days later. So let's just start with some, some
16 amount, some number, some sequence of requests. Right?

17 So the critical pieces of information for the algorithm
18 are the -- well, we talked about when files are inserted, it's
19 broken up into blocks.

20 Q Correct.

21 A Okay. So it's the number of blocks that have been inserted
22 into the network.

23 Q Let me just stop you there.

24 A Sure.

25 Q So when you say that, so you've got this recorded data.

1 Part of that recorded data consists of the hash values that
2 relate to blocks of interest because they're known child
3 pornography.

4 A Um-hum.

5 Q So what's the difference between those blocks you've got
6 there and the block that's inserted into the system?

7 A So what we have is a list of requests for those blocks and
8 we also know, as you said, that these blocks relate to a
9 particular password or manifest. Right? That manifest can be
10 downloaded, has already been downloaded by law enforcement.
11 That's why it's a manifest of interest. That's why it's a
12 password of interest, a file of interest.

13 So what I mean by that is the total number of blocks
14 that were originally inserted into the network is -- I mean,
15 that's what a table of contents is, right? If you have a table
16 of contents of a book and there's 18 chapters, you know there's
17 18 chapters. Here we have a table of contents of blocks that
18 have been inserted. It could be a thousand blocks.

19 So we know the total number of blocks that were
20 inserted originally. We know the number of requests that were
21 made by this stranger next to you. We know the number of peers,
22 the number of strangers that that requester has themselves. And
23 then we make an assumption about if this person, if this stranger
24 was a relayer, how many neighbors, how many strangers the
25 original requester has. We can't see that.

1 So we set that value to something very conservative
2 that favors coming to the conclusion that this person's a
3 relay. So we sort of hedge on the side of assuming they're a
4 relay.

5 Q Okay.

6 A So those are the four essential pieces to the algorithm.

7 Q So one very important part is the number of blocks relayed
8 or requested?

9 A Yeah. The number of requests is one.

10 Q And when you say number of requests, number of requests for
11 a block, correct?

12 A The number -- yeah. The number of requests made to retrieve
13 this -- the number of requests made. Some of them are duplicate
14 requests. I'm not sure what you're saying.

15 Q Well, aren't requests only for blocks? That is, aren't the
16 communications only requesting a block that comprises part of a
17 total file?

18 A Right. So the number of unique blocks requested.

19 Q Right. I would think you need to know the number of blocks
20 and the number of total blocks that comprises a file.

21 A To run the algorithm?

22 Q Right.

23 A Yes.

24 Q So if you don't, for example, if someone's requesting one
25 block and the file consists of three blocks, that might tell you

1 something. But if someone's requesting one block and it consists
2 of one million blocks, it wouldn't seem to tell you much at all.

3 A If you wanted to run the algorithm, yes, you would need that
4 information.

5 Q Okay. So the statistical significance, that probability
6 determination would be, could not even be determined unless you
7 know the total number of blocks?

8 A If you wanted to run it yourself, you would need that
9 information.

10 Q Well, if you want to run the algorithm at all, right? I
11 mean, if you want to make it a valuable algorithm?

12 A Yeah. To run the algorithm yourself, you would need that.

13 Q Do you need anything about the timing or the frequency of
14 these requests?

15 A No. You just need to know that. The timing is really part
16 of this filtering process. Like I said, if it's one block and
17 then five days later another block, that's unreasonable. So the
18 timing of the request really refers to the window of duration
19 that they appeared in. So you don't, you don't technically need
20 that to run the algorithm. It's just sort of part of the
21 filtering process.

22 Q Okay. All right. But you would need to know, A, number of
23 blocks requested, B, total number of blocks that comprise the
24 file?

25 A To run the algorithm yourself, yes.

1 Q And to make any degree, any type of, any determination about
2 the statistical significance of the probability that you're
3 trying to attach to distinguish requesters from relayers?

4 A If you wanted to do it yourself, yes.

5 Q Well, I don't understand the difference between -- so when
6 you say if you wanted to do it yourself and you modified, what do
7 you mean?

8 A If you wanted to reproduce the results yourself, that's what
9 you would require.

10 Q Right.

11 A You asked me what's required for the algorithm. And I'm
12 telling you, to run the algorithm yourself, you would require
13 this information. So yes, if you want to just say yes.

14 Q I'm sorry. Forgive me. That's on my end. So I'm just not
15 understanding.

16 A Yes.

17 Q The answer is yes?

18 A The answer is yes.

19 Q It doesn't have any real significance without that
20 information? The algorithm doesn't have significance without
21 that information?

22 A Well, no. The algorithm's been tested and evaluated. If
23 you want to rerun the algorithm yourself --

24 Q Right.

25 A -- you need all the values. But the algorithm, you know,

1 includes the paper, for example, that's been evaluated. I'm here
2 to tell you, say I did it myself.

3 Q Understand. What I'm getting at each time there's an
4 investigation that's ongoing, in order for law enforcement to
5 make these probabilistic determinations on any given
6 investigation with respect to any given file, they need to know
7 the number of blocks in the file and the number of requests for
8 the blocks?

9 A Yes.

10 Q Okay. Forgive me on that.

11 A I'm doing my best. I apologize.

12 Q Not your fault. So a different topic, mercifully. To know
13 if a hash value is of significance, I would presumably need some
14 type of database of known hash values?

15 A Of hash values of interest, yes.

16 Q Right. So how was that created and stored and collected?

17 A Someone who have to visit public forums. Right? We
18 mentioned before that Freenet has these websites that has these
19 bulletin boards. You would visit those public forums. We saw an
20 example in the exhibit of how these manifest keys, what we call
21 passwords, were listed at the bottom of the website. And then
22 you can, you can quite easily -- anyone who's running Freenet,
23 the very first part of retrieving a file that's been inserted,
24 given the password, is to get this list of blocks. So, but you
25 can really just ask about the passwords. You'd have to visit

1 these particular websites or forums.

2 Q But if I have a key or if I have a password or if I have a
3 hash value or whatever I have, I don't know if it relates to
4 anything until I know the file that it's attached to, right?

5 A I wouldn't say that. For example, if -- if I may. If it's
6 been posted to a forum that's related to child pornography, that
7 certainly predicates your conclusion or your interest in that
8 file.

9 Q Sure. But it might not tell you what the file really is?

10 A No.

11 Q So --

12 A Context is important.

13 Q Right. So I'm assuming at some point databases have to be
14 built to files of actual child pornography?

15 A Yes.

16 Q And files of hash values?

17 A Yes.

18 Q Okay. Have you, do these vast databases or libraries exist?

19 A Yeah, to my knowledge, they do.

20 Q Okay. Where are they?

21 A They're with law enforcement.

22 Q Okay. They're with the internet --

23 A I'm not --

24 Q Forgive me.

25 A Yeah. I'm not law enforcement, so I have no special ability

1 to collect child pornography.

2 Q Right. It would be unlawful for you to do that?

3 A That's right.

4 Q So you couldn't build that kind of database, right?

5 A Well, I can, I can handle --

6 Q It makes --

7 A -- the hash values.

8 THE COURT REPORTER: One at a time, please.

9 Q Forgive me.

10 A I apologize.

11 Q That's my fault.

12 A Do you want to start? I can't build a database of images.
13 I could be involved in a collection of hash values since those
14 are just texts.

15 Q Hash values, not illegal? Images and files are?

16 A Exactly.

17 Q You could not have a database of files or images?

18 A Not me personally, no.

19 Q You don't know who's -- you know that there's a database of
20 images and files that exist but you don't know who constructed
21 it?

22 A I know generally, you know. I know of law enforcement who
23 have told me they do that. But I'm not involved in that.

24 Q And you weren't involved in the construction of the database
25 of hash values, either?

1 A No, not me personally.

2 Q Okay. Have you reviewed the search warrant affidavit in
3 this case?

4 A Just briefly.

5 Q Does it look accurate to you?

6 A Looked accurate to me? I don't know. In what way are you
7 asking?

8 Q Well, I'm asking your independent evaluation. Did the
9 information look accurate? I don't know how else to phrase that.

10 A It was, it was a search warrant for things that I didn't
11 observe so I have no basis to say whether it was an inaccurate
12 description of what the officer found.

13 Q No. I'm asking you about the description of the way in
14 which Freenet functions.

15 A I didn't review that part extremely carefully, but the part
16 that I reviewed looked accurate to me.

17 Q Who asked you to review it?

18 A It was given to me as part of the materials for this case by
19 the prosecutors.

20 Q Okay. But you didn't review it carefully?

21 A I can't recall it from memory, but I did read through it
22 once.

23 Q When did you review it?

24 A You know, some number of months ago. Maybe a month ago.

25 Q Not recently?

1 A Not recently.

2 Q Recent being within the last couple of days. Forgive me.

3 A I flipped through it in the last couple of days, but I
4 didn't reread it carefully. If you have it, we can look at it.

5 Q I do. I was just curious, though. So you have no
6 independent -- you can't say whether it accurately describes
7 Freenet or not?

8 A It looked accurate to me, as I recall it. Nothing stuck out
9 to me as incorrect.

10 Q Okay. So that's all I was asking.

11 A Okay. Sorry.

12 Q It looks like an accurate description of the Freenet process
13 to you?

14 A Um-hum.

15 Q Earlier on direct you testified to some vulnerabilities that
16 are discussed on Freenet, on Freenet. Do you recall that
17 conversation with the prosecutor?

18 A Yes, I was referring to the Freenet website.

19 Q You have no idea if Mr. Hall ever saw those or not, correct?

20 A I do not. I do know that he saw the Freenet website,
21 though.

22 Q I understand, but that's a separate question. My question
23 was whether or not Mr. Hall has seen them, correct?

24 A I don't know.

25 Q Do you know how often that statistical analysis, the

1 algorithm, is run by law enforcement on a given day?

2 A I don't know.

3 Q Do you know if it's run each day?

4 A I presume, but I don't know.

5 Q Your Honor, if it would be okay with the Court, if we could
6 take our break now? I'd just like --

7 THE COURT: No. I have a 1:00 meeting so we can't take
8 it.

9 Q I see. Okay.

10 (Pause while Mr. Fein confers with the defendant.)

11 Q The current version of the algorithm that you're using, when
12 was that perfected?

13 A I don't remember the exact month. But, you know, within the
14 last year or two.

15 Q And --

16 A Before, before August 2016. I know that.

17 Q Okay. Fair enough. When were the simulations run for that
18 particular version?

19 A Probably fall -- well, I would say fall of 2016.

20 Q Okay. So September, October, November? Technically, that
21 would be fall, correct?

22 A Well, hold on. We ran some initial simulations in the
23 spring and then we ran a great deal more, number of simulations
24 for the paper. So really, a part of perfecting the algorithm is
25 really the evaluation. So we're going back a bit here. But

1 before the summer of 2016.

2 Q Okay. In any given case that law enforcement investigates,
3 they use this process that we've tried to discuss today, once law
4 enforcement has the information, that's the output from the
5 algorithm, from the database, the bits of information that are
6 collected, you don't know what they do with that, correct?

7 A I'm not there to personally observe it.

8 Q Right. So for all you know, the officer looks at that data
9 and go gets a warrant, correct? You don't know? Not asking you
10 idea. I'm asking you, you don't know what the individual officer
11 does?

12 A I don't know what they do with the data we had given them.
13 I don't know what they do with the data we had given them.

14 Q I have no further questions, Your Honor.

15 THE COURT: Any redirect?

16 REDIRECT EXAMINATION

17 BY MS. SHOOP:

18 Q Very briefly, sir. Dr. Levine, if an individual is sending
19 requests and they are identified in this modified version, we can
20 say for sure one thing, that they're using the open-net mode, is
21 that correct?

22 A That's correct, because the modified version only connects
23 to the open-net mode of the software.

24 Q And when the defense counsel showed you the slide that
25 discussed the low and normal and then the maximum for open and

1 darknet -- do you know what I'm talking about?

2 A Um-hum.

3 Q So you may not be able to state which one Mr. Hall used, but
4 we know for sure he was on the open-net mode of Freenet?

5 A Yes.

6 Q The information that the modified version records, is it
7 accurate to say that information that they record is only from
8 requests that are sent intentionally and directly to it?

9 A Yes. Only, it's only information --

10 MR. FEIN: I'm going to object simply because the use
11 of the phrase "intent", right, and "intended", suggests there's
12 an individual who's sending a communication from one communicant,
13 from one computer to another intentionally. It is an automated
14 system that's relaying a communication. No objection to his
15 answer. But I think we ought to speak in terms that reflect
16 what's factually happening.

17 THE COURT: Overruled.

18 THE WITNESS: Yes.

19 BY MS. SHOOP:

20 Q Dr. Levine, the modified version that you created or
21 assisted in creating, it only logs the information that already
22 exists within a request, is that right?

23 A It only logs information that any other user of Freenet with
24 an unmodified version would already have.

25 Q And I think you had mentioned this. But in order for law

1 enforcement officers to utilize this modified version, they have
2 to go through training?

3 A Yes.

4 Q And there was some discussion about, it seemed the defense
5 used the word "versions" of this. Are there multiple different
6 versions of this modified software or one version?

7 A I don't believe the defense was referring to versions of our
8 software.

9 Q Okay. I just want to make sure that that's clear. So is
10 there only one version of this modified software?

11 A Well, we update the software occasionally. But I don't, I
12 don't know how many versions -- I'm not the person that makes
13 these small modifications. There's been no significant
14 modification of the software in terms of the basic algorithm.
15 Sometimes things are made easier or streamlined, things like
16 that. It's not something that I do personally. We've never made
17 a modification to the algorithm that I've described today.

18 Q Okay. And that was my next question. And then you had
19 briefly mentioned that the passwords that law enforcement, that
20 they collect, those are all publicly available, is that right?

21 A Yes. That's my understanding.

22 Q That's all.

23 THE COURT: Any recross?

24 MR. FEIN: No, Your Honor.

25 THE COURT: Thank you very much, Dr. Levine.

1 THE WITNESS: Thank you, Your Honor.

2 MS. SHOOP: And then, Your Honor, at this time we have
3 -- I think most of the exhibits were attached to the motion. But
4 there was one additional exhibit that was not. And that's
5 portions of the transcript from Mr. Hall's interview, that I
6 would like to offer at this time.

7 THE COURT: Okay.

8 MS. SHOOP: And that's marked as M-7. Your Honor, I
9 actually have a copy for you. Would you like a copy?

10 THE COURT: You can give it to the clerk.

11 MS. SHOOP: Yes, sir. Your Honor, what that contains,
12 just so I can briefly describe it to the Court. Mr. Hall was
13 interviewed on the day the residential search warrant was
14 executed. And those are portions of his trans, his interview.
15 They're just transcribed.

16 Those relate directly to this motion where Mr. Hall
17 discusses with law enforcement that he's actually a Java
18 programmer for a living. He teaches Java programming. He's
19 familiar with Freenet. He knows how Freenet works. And he goes
20 through a bunch of other information to show his computer
21 sophistication in those portions of the transcript.

22 And then, lastly, he relays to law enforcement that he
23 understands that his IP address on Freenet was not hidden, and he
24 did not make any additional efforts to cloak or hide his IP
25 address.

1 THE COURT: Yes, Mr. Fein?

2 MR. FEIN: I have no objection.

3 MS. SHOOP: And that's all we have on this motion.

4 MR. FEIN: I have no objection.

5 THE COURT: Well, do you want to call the other
6 witness, even though it's a separate issue?

7 MR. BUDLOW: Your Honor, actually, I was hoping that we
8 would be able to resolve this issue first. But I do think that
9 there might be a way that we can productively use the next few
10 minutes. My understanding is that the defense intends to call
11 two witnesses on the issue of the search warrant. And I would
12 ask for the Court at this time to require some proffer as to the
13 subject matter of both of them because the government does
14 believe that there's a likelihood that we'd object to both of
15 those witnesses.

16 Certainly, one I mentioned earlier is Detective Rees
17 that they intend to call. So I think it would be the right time
18 for them to make that proffer. And we can discuss whether or not
19 a Franks hearing is appropriate. And the other witness, I'll let
20 them speak for. But I have requested a proffer as to what the
21 subject areas that they would be asking that witness about with
22 respect to this motion, and I still haven't received a response.

23 MR. FEIN: So, Your Honor, I mainly have one witness
24 I'm interested in at this point, and that would be Detective
25 Rees. So we heard earlier from Dr. Levine about the modified

1 version of Freenet developed by the University of Amherst, how
2 that modified version of Freenet operates in theory, how the
3 algorithm developed operates in theory, how that algorithm is
4 used to analyze data, to yield results in a, of a statistical
5 probability. But what we didn't hear is how, in this particular
6 case, data was recorded, how much data was recorded, who recorded
7 that data, and what was done with that data.

8 The affidavit suggests that Detective Rees is the
9 individual that was running, in this case, the modified version
10 of Freenet.

11 I have a theory -- and it should be no surprise to the
12 government because they've looked at prior transcripts of another
13 case -- and I haven't pursued it yet, but I'll give you the
14 outlines of it.

15 You heard from Dr. Levine that the way modified Freenet
16 works in this case is to record data. It records, among other
17 things, date stamps, timestamps, a hops-to-live value, a hash
18 value, and an IP address. Perhaps as many as 3,000 replicants,
19 replications of that information are collected a day. And that
20 is data recorded. And that data is stored by the government.
21 And that data belongs to Freenet users who may be requesters of
22 information, who may be relayers of information. It's unknown to
23 the government at the time that data is collected and stored who
24 those people are. And, in fact, that data is previously
25 separated out by the government in the course of its

1 investigation, according to hash values that are associated with
2 blocks. Those hash values associated with blocks that are not of
3 interest to the government are moved to one side. And those that
4 are, are recorded.

5 Subsequent to that, the government runs an analysis of
6 that data and tries, through that analysis, to determine who are
7 the statistically probable requesters of information. That
8 process Mr. Levine can speak in part to, but not completely.
9 He's not the officer who ran the modified law enforcement known
10 computer software in this case. Mr. Rees is. This in some way
11 gets back to what we addressed earlier when I discussed calling
12 Judge Cavanaugh as a potential witness.

13 So if the Court had any doubt earlier, it can see now
14 how complicated and confusing and atypical this kind of
15 investigation is from an ordinary computer-based investigation.
16 One from like the Gnutella network, LimeWire, as was discussed on
17 direct.

18 The government wants, it seems to me very much, to
19 subject as few people to cross examination as is humanly
20 possible. That's fine. They have a job to do and I don't
21 begrudge them that. So they move to keep the judge from taking
22 the stand. If you have any doubt earlier that that judge might
23 not really have understand that warrant, you might not have that
24 doubt now because you can see how complicated this matter is.
25 This isn't my first case on it. I'm still trying to get my head

1 around it.

2 But Detective Rees ran the investigation in this case.
3 The government suggests I shouldn't be able to subject him to any
4 cross examination about the investigation he ran. Why would
5 there be no transparency on that matter? It relates to Fourth
6 Amendment interests of Mr. Hall. It relates to whether or not
7 there was a search and seizure here that was conducted perhaps
8 warrantless from the outset of the investigation. And some of
9 the information that relates to that is held by Mr. Rees.

10 So I would ask the Court to let me question him. If it
11 thinks I'm going too far afield, that's there's nothing of merit
12 to ask him, it can stop me and explain why. But why should I not
13 at least have the opportunity to discuss with him the
14 investigation in this case he ran using the modified Freenet
15 software to determine what he did, how many requests were coming
16 through, and what he did with that information?

17 THE COURT: Mr. Budlow.

18 MR. BUDLOW: He may not like Franks, he may not like
19 that the government wants the Court to uphold the law, but that's
20 the law. The law is you don't get to call on a motions hearing
21 witnesses because you want to cross examine them based on the
22 investigation, and you don't get to proffer things like "I have a
23 theory" as a factual basis for something that you want to pursue
24 with a witness. "I have a theory" is not proof. "I have a
25 theory" is not evidence. It's fishing.

1 He hasn't explained anything that he might ask
2 Detective Rees that isn't completely covered in two places that
3 the Court's already seen. One is you have an understanding of
4 Freenet, which may have been extremely complicated on cross
5 examination. It was a lot clearer during direct. You have an
6 understanding of how that works, and that goes to whether or not
7 the law enforcement version of which there's only one,
8 essentially the same version that's existed for years, how that
9 version works.

10 You have an affidavit from Detective Rees that says I
11 used the law enforcement version of the network, as he described
12 it, and used and discussed what it recorded, how it recorded it,
13 who recorded it. The information is in the four corners of the
14 affidavit.

15 The defense has articulated nothing more than fishing
16 in this case and cloaked it in the idea of open courts. There
17 will be an open court, an open opportunity for them to cross
18 examine the detectives's investigation at the trial. But at a
19 motions hearing where they're alleging information relating to
20 the affidavit or information relating to the search, they have to
21 have a proffer of real evidence, of something that makes the
22 testimony relevant. And in this case, there's truly nothing that
23 they've stated that relates in any way to the issues that they
24 raised in the search warrant.

25 THE COURT: No, I'm not going to allow the cross

1 examination. It does not seem to me to rise to a Franks level.

2 Okay. We'll break and resume at 2:00.

3 (Luncheon recess at 12:48 p.m. Resume at 2:10 p.m.)

4 THE COURT: All right. Where do we stand?

5 MS. SHOOP: Yes, Your Honor. The government is ready
6 to argue this motion.

7 THE COURT: Okay. Okay. Go ahead.

8 MS. SHOOP: Yes, sir. Your Honor, what the, what the
9 defense is alleging in this case is essentially three different
10 arguments within one motion. And the first is that Mr. Hall had
11 this expectation of privacy in these requests that he
12 intentionally and voluntarily sent to all of his peers, all of
13 those strangers. And that is simply not the case.

14 And there's two things for the Court to look at. And
15 one is did he have an actual, subjective expectation of privacy
16 in the request that he sent to these strangers, and is that
17 objectively reasonable? And the answer to both of those is no.

18 THE COURT: Well, wasn't a search warrant necessary?

19 MS. SHOOP: Absolutely not, Your Honor. And the only
20 time that a search warrant is necessary is if there is a search
21 that occurred. And in this case no search occurred because Mr.
22 Hall did not have an expectation of privacy in the requests that
23 he sent, not to any of his peers, to include the one to law
24 enforcement. And this is why.

25 He certainly, you know, at this stage, he's now

1 alleging that he truly believed that these requests on this
2 peer-to-peer site would remain private. But that's not the case
3 every day that he sat behind his computer and actually utilized
4 the Freenet peer-to-peer software. And that's for two reasons.
5 And the Court should consider first this defendant's computer
6 sophistication.

7 We do not have a user that's on a peer-to-peer network
8 just kind of passively, you know, logging on and checking things
9 out. As you can see from his interview, Mr. Hall himself is a
10 Java programmer. This language --

11 THE COURT: So you don't need a search warrant if the
12 person is, is knowledgeable in computers?

13 MS. SHOOP: No, sir. That's not what I'm saying. I'm
14 saying that you don't need a search warrant if -- the only time
15 you need a search warrant is if an individual has an expectation
16 of privacy in those requests. But he didn't. And that analysis
17 is twofold, the subjective and objective.

18 THE COURT: But he has, he has an interest of privacy
19 in his home.

20 MS. SHOOP: I would agree with you, Your Honor. There
21 are situations, for example, in United States v. Kyllo, where
22 they have a privacy interest inside of their home. But that is
23 completely distinguishable from the facts at hand in this case
24 when you're dealing with a peer-to-peer network, which many
25 courts have held that defendants do not have expectations of

1 privacy when they utilize peer-to-peer networks.

2 MR. BUDLOW: Your Honor, may I have a moment? Sorry
3 for the interruption.

4 (Pause in proceedings.)

5 MS. SHOOP: And, Your Honor, and I just want to make
6 sure that this is, the situation that we're talking about here is
7 not the residential search warrant, but the original sending
8 requests on the peer-to-peer network for files.

9 THE COURT: Okay.

10 MS. SHOOP: Yes. So this is the original action by the
11 user on Freenet. So when Mr. Hall signed on to Freenet and he
12 tried to download images of child pornography, he, of course, had
13 to send these requests out to his peers. And that collection of
14 information, when the law enforcement computers collected that
15 information, they would not need a warrant to do that. So that's
16 the situation I'm talking about for the first point.

17 THE COURT: Okay.

18 MS. SHOOP: If for some reason that was not clear, I
19 apologize.

20 And so when law enforcement collected the information
21 about his request that he intentionally sent to them, they didn't
22 need a warrant because he did not have an expectation of privacy.
23 And that, Your Honor, is for a few reasons.

24 He certainly didn't have a subjective expectation of
25 privacy because of his computer sophistication and because of the

1 fact that he was warned by Freenet, by the software, multiple,
2 multiple times, and multiple different places, that his activity,
3 sending those requests, would not remain private.

4 And if you look at the transcript that the government
5 provided Your Honor from his interview, he talks about the fact
6 that he's a computer programmer. He teaches other computer
7 programmers. And he admits that he knew what Freenet was, he
8 knew how it worked, and he knew that Freenet did not hide his IP
9 address.

10 You saw and you listened to Dr. Levine testify about
11 all of those warnings that Freenet provided him. And we know
12 when you looked at this exhibit, Your Honor, we know that he was
13 faced with an option, to choose low security or high security.
14 And we know he chose the one that's labeled low security.

15 MR. FEIN: Your Honor, I'm going to object because it's
16 misstating the evidence. Dr. Levine testified this had been up
17 on Freenet from 2012, maybe 2011, but he had no idea when Mr.
18 Hall had actually downloaded the Freenet software on his
19 computer.

20 THE COURT: You can make that argument. Go ahead.

21 MS. SHOOP: In fact, Your Honor, what's important about
22 that argument by the defense is what's also in the transcript in
23 front of you is that Mr. Hall admitted that he had been running
24 the Freenet software for the prior two years from when the search
25 warrant, the residential search warrant, was executed in

1 September of 2016, and he installed and uninstalled the program
2 10 different times. Ten times. Every time he reinstalled it, he
3 was faced with this choice. And so he clicked "choose low
4 security" because that's the only one that law enforcement
5 investigates, is the open net low security.

6 So for Mr. Hall today, Your Honor, to claim that he
7 truly believed that those requests that he sent out on this
8 peer-to-peer network would remain private is completely
9 unreasonable.

10 And it's objectively unreasonable, even if he did have
11 a subjective expectation of privacy in light of way the program
12 actually works. When you're on Freenet, if you want to rebuild a
13 file or you want to retrieve child pornography, like Mr. Hall
14 wanted to, you have to actually send requests to all of those
15 strangers that you're connected to. And then you can get enough
16 pieces of the file to reboot it. And the user sees it on his
17 computer.

18 So in doing that, you intentionally send out these
19 signals to other people's computers. And those signals have
20 information attached to it. So you intentionally send that
21 information to third parties. And the Supreme Court, in a long
22 line of case law, has stated that when you voluntarily turn
23 information over to third parties, it's not protected.

24 And that's exactly what Mr. Hall was doing in this
25 case. Every time he sent out one of those requests and when he

1 sent out the request to the law enforcement computer, he
2 voluntarily turned over the information connected to that request
3 because he intended for all of his peers to accept the request so
4 he could rebuild a file.

5 So, Your Honor, the defense's argument that when Mr.
6 Hall sent those requests for pieces of files of child
7 pornography, he certainly did not have an expectation of privacy.
8 And because he didn't have an expectation of privacy, the
9 government did not conduct a search. And they did not need a
10 warrant to take that information and analyze it.

11 So that's --

12 THE COURT: Okay. You want to discuss the search
13 warrant generally, too?

14 MS. SHOOP: I do, yes, Your Honor. That's the third
15 issue. I can certainly address the second issue by the
16 defense --

17 THE COURT: Why don't you address that?

18 MS. SHOOP: The search warrant, sir?

19 THE COURT: Yes.

20 MS. SHOOP: Yes, sir.

21 THE COURT: I'm a bit confused by the government's
22 letter of July 10 since it conflates the two.

23 MR. BUDLOW: Your Honor, if I could just address the
24 letter of July 10.

25 THE COURT: Yes.

1 MR. BUDLOW: The first section dealing with the search
2 warrant is explaining to Your Honor that Dr. Levine would be
3 testifying with respect to their motion about the search warrant.
4 Issues, what we've called issues one and two is the defendant is
5 saying that the search warrant's invalid because of the
6 pre-search warrant activities. So Dr. Levine testified about --

7 THE COURT: Okay. Do you want address the search
8 warrant?

9 MR. BUDLOW: Yes. I think Ms. Shoop's going to do that
10 now.

11 MS. SHOOP: Yes, sir, I do. Thank you. So the
12 residential search warrant, so the defense is making the argument
13 that the search warrant was not supported by probable cause.
14 Your Honor, you have a copy of the search warrant in front of
15 you. In looking at the four corners of the search warrant, it is
16 certainly supported by probable cause. This is not a search
17 warrant that's bare bones. It's not a search warrant that
18 doesn't have any supporting facts, background information about
19 the investigation.

20 Probable cause doesn't require absolute certainty. It
21 requires only a fair probability that contraband or evidence will
22 be found in a particular place.

23 The affiant in this case, which is an individual by the
24 name of Detective Rees, he put tons of information in his search
25 warrant. He gave the magistrate information about his

1 background, his training as a law enforcement officer. He told
2 the magistrate information about the fact that he works child
3 pornography cases. He laid out the multiple courses that he's
4 attended relating to child pornography, to include a law
5 enforcement course on Freenet. It's the very first one listed in
6 the affidavit.

7 He set forth a thorough explanation of searches and
8 seizures of computer systems, of wireless systems, because that's
9 what we have in this case.

10 He provided the magistrate with an explanation of this
11 software. He explained about peer-to-peer software. He
12 explained that Freenet was a type of peer-to-peer software. And
13 he explained how Freenet worked. He even has a section in the
14 affidavit dedicated to definitions regarding the software so that
15 can assist the magistrate in making that probable cause
16 determination.

17 He told the magistrate that law enforcement is using a
18 modified version of Freenet to conduct these investigations. He
19 explained to the magistrate the information that law enforcement
20 collected about the requests. He listed that.

21 The affiant even explained that there was this method,
22 when they had that information, that they could use to analyze
23 the information. In fact, it says he explained that there are
24 streams of requests for pieces of files from an IP address that
25 can be evaluated to determine if that IP address was the likely

1 requester of the file of child pornography.

2 Further, the magistrate -- excuse me -- the affiant
3 explained that the information that's collected has been
4 calculated using the algorithm that Dr. Levine testified about,
5 which he then, in turn, can determine which user is the likely
6 requester of child pornography.

7 He explained what the goal of the investigation was,
8 and that was to target the original requesters of child
9 pornography.

10 And then not only did he give all of this background
11 information on Freenet, the method, the modified version, he then
12 has an entire section set out for the specific probable cause in
13 this case relating to Mr. Hall. And within that, Your Honor, he
14 didn't lay out just one file. He listed seven different files
15 for the magistrate to consider. He described the contents of the
16 file because this law enforcement officer, he didn't just rely on
17 the algorithm, like Dr. Levine testified. He went back and he
18 even downloaded all seven files himself to ensure that they
19 contained child pornography, which they did.

20 He told the magistrate that they use the method, and
21 these are the files that they located. And by using the method
22 in the algorithm, they determined that Mr. Hall was the likely
23 requester of these child pornography files.

24 He then connected the IP address that was downloading
25 these files to Mr. Hall. He went out, he subpoenaed the

1 information. It came back to his wife and to that residence,
2 which is the residence that's listed in the search warrant.

3 Your Honor, the law enforcement agent, the affiant in
4 this case, laid out plenty of information for the magistrate to
5 make a determination of probable cause that child pornography
6 would be located on the digital devices at this residence at this
7 IP address. And so it's the government's position that the
8 warrant was supported by ample probable cause. But even if the
9 Court were to find that it wasn't, Detective Rees certainly
10 reasonably relied on that. And we'd ask that the Court apply the
11 good faith exception.

12 As you know, Your Honor, if you have an agent that
13 reasonably relies on a signed warrant, which Detective Rees did,
14 there are four situations where you could still suppress the
15 evidence. None of those situations apply in this case.

16 First, the magistrate was not misled by anything in
17 the, anything in the search warrant that the affiant knew was
18 false or would have none was false except for his reckless
19 disregard. There's no allegation that there's any false
20 information contained in the affidavit.

21 The magistrate, she did not act as rubber stamp and
22 abandon her role. Just because the magistrate may not be an
23 expert in every single field out there, as the defense suggests
24 in their motion, does not mean she acts as a rubber stamp, not at
25 all. In fact, the government could not find any case law to

1 support that proposition. It's a common sense decision. And so
2 the magistrate read the entire warrant in its entirety and made
3 the determination that probable cause did exist.

4 The third is that the affidavit was not so lacking in
5 an indicia of probable cause to render Detective Rees's reliance
6 on it entirely unreasonable. You have it in front of you, Your
7 Honor. You can see from the four corners there is a ton of
8 information in there supporting probable cause.

9 And then lastly, this is not a warrant that was
10 facially deficient. It's not a warrant that didn't state the
11 places to be searched or things to be seized.

12 So, Your Honor, the warrant is supported by probable
13 cause. But should the Court find that it's not, the good faith
14 exception would absolutely apply in this case.

15 Subject to any additional questions about the warrant,
16 Your Honor, just the last argument made by the defense is that
17 the government violated the Wiretap Act and the ECPA, the
18 Electronic Communication and Privacy Act, by obtaining that
19 information from the request. And I'm certainly happy to address
20 that issue as well.

21 THE COURT: No. I'll hear from Mr. Fein.

22 MS. SHOOP: Yes, sir.

23 MR. FEIN: Your Honor, what I'd like to do is ask the
24 Court for a bit of time to file a memorandum on the evidence that
25 was offered today to the testimony of Dr. Levine. I didn't know

1 what he would testify to prior to today. The testimony links to
2 the issues that I've raised preliminarily before the Court, but I
3 couldn't develop those arguments in full because I simply didn't
4 know what he would testify to.

5 I don't think things are quite as simple as the
6 government suggests. Maybe at the end of the day you'll find
7 that there was no problem with the original investigation
8 conducted by the government. Maybe you'll find otherwise. But I
9 think I need a chance to actually develop that argument for you
10 in a meaningful way. To discuss it here in 10 minutes without
11 the benefit of providing you with something more meaningful in
12 writing would seem to me to serve Mr. Hall not quite so well.

13 I do believe there's something meaningful I can provide
14 this Court. So I'm simply going to ask the Court to give me time
15 to file a post-hearing memorandum so I can give you something in
16 detail that links to the transcript testimony and the testimony
17 of Mr. Levine today to support the argument that there was a
18 warrant indeed needed from the outset.

19 I have just two comments because I don't want them to
20 go without passing, for purposes of the record. Whether or not
21 there's anything misleading in the affidavit we would never know
22 because I've not been allowed to cross examine Mr. Rees.

23 Whether or not the judge read the affidavit in whole,
24 in part, or not at all, we would also never know because I've not
25 been allowed to cross examine the judge at the state level.

1 Those two matters aside, I would ask the Court today to
2 give me 30 to 40 days to provide this Court with a written
3 memorandum --

4 THE COURT: Let me ask you. Why --

5 MR. FEIN: Yes.

6 THE COURT: -- why isn't it in every case that, under
7 your theory, you wouldn't call the judge?

8 MR. FEIN: Well, here's why. So let me give you an
9 example, Your Honor. So this will be a pretty straightforward
10 one.

11 Take your average narcotics investigation that many
12 officers work on on a daily basis. Suppose I am a magistrate
13 judge. An officer comes to me with a warrant and the officer
14 says to me, Judge, I've got a confidential source and this source
15 has told me about drug activity taking place at home number one
16 on A Street. And the informant has told me that he's purchased
17 narcotics, marijuana, from the occupant of home number one on A
18 Street on multiple occasions, and this informant returned to the
19 home yesterday and purchased more marijuana from the occupant of
20 home number one on A Street. In addition, while the individual
21 was there, they saw marijuana in the home. This was in the last
22 24 hours.

23 Now, the officer tells me I'm not so sure about this
24 informant, he has been somewhat reliable in the past, not
25 perfectly reliable in the past. So to corroborate the

1 information he gave me, I surveilled the home. And when I saw,
2 when I surveilled the home, I saw people coming and going. And I
3 saw them coming and going in times, maybe every ten minutes.
4 They'd stay for two minutes and leave. It was consistent with,
5 consistent with my experience about how quickly people come and
6 go during drug investigations, that they're simply meeting
7 someone at a home to buy drugs.

8 Those facts are all facts that would be within the
9 common understanding of any individual. We all know what it's
10 like to watch a home, to see people come and go, to notice
11 whether or not the frequency with which they come and go is
12 consistent with a visitor. They're there to perhaps have dinner
13 or perhaps consistent with something different.

14 Those facts are not facts that would be difficult for
15 anyone with --

16 THE COURT: But I thought you just said that -- I mean,
17 suppose the magistrate didn't read it?

18 MR. FEIN: I'm sorry?

19 THE COURT: Suppose the magistrate didn't read it?

20 MR. FEIN: Suppose the magistrate didn't read it.
21 Right. So if the magistrate didn't read it, then you're right.
22 So I would want some -- so in my argument in my case, it wouldn't
23 have been that the judge didn't read it. Right? So my point was
24 simply there's case law where judges have been alleged not to
25 have read warrants and judges have been called to the stand to

1 testify and have, in fact, testified. So, for example, if --

2 THE COURT: But why wouldn't you be able to call the
3 judge in every case?

4 MR. FEIN: Well, I think maybe you could. But I think
5 there are institutional pressures that work against doing so.
6 So, for example, I practiced law for several years. I may not be
7 the finest lawyer. But I don't call judges on every occasion to
8 testify in every case because I simply believe that there's no
9 reason to do so. There's nothing atypical, nothing unusual that
10 I want to question that judge about. I certainly am not in the
11 business of wasting the time of judges or the time of any
12 witness.

13 What I want to do is try to protect the constitutional
14 rights of the individuals that I represent. So if it seems like
15 there's a reasonable, a reasonable basis to call somebody, I do
16 so. If there doesn't seem like there's any reasonable basis,
17 nothing of fruitfulness that will come from it, I don't.

18 So is there a reason why I wouldn't call a judge in
19 every case? Yes. Because there would seem to be no reason to do
20 so.

21 But if your point is simply I could do it, I guess
22 that's true. I'm assuming the Court's point there is, well, that
23 seems ridiculous that you can call people in any case. But
24 people are called every day, Your Honor. Ordinary people, too.
25 There's nothing special about a judge except insofar as the case

1 law indicates that you should not probe their mental
2 decisionmaking process.

3 But in terms of the facts they hold, there's nothing
4 special. They are ordinary people who put their pants on in the
5 morning like the rest of us, who dress themselves like the rest
6 of us. And if there's something relevant to testify to that is
7 material, they ought to be questioned. Simply because they don a
8 robe in the afternoon or the morning doesn't mean they have to be
9 insulated from scrutiny, at least not in a government that's
10 structured like ours.

11 So could that happen? Yes. Do I think it would? No.
12 Number one, for institutional reasons. But, two, even if it did,
13 that would not in and of itself be the greatest reason to say no,
14 the citizens who are accused of crimes in our country may not
15 question judges, even if it's limited to the facts that they want
16 to probe. That would not seem like the kind of system that we
17 have designed.

18 THE COURT: That's a good answer.

19 MR. FEIN: So that aside, I'm simply trying to do the
20 best I can for Mr. Hall. And I will ask, I don't think this case
21 is quite as simple as the government would like you to think it
22 is. And, in fact, I shouldn't even say that. I don't what the
23 government wants you to think. That's their business.

24 All I can tell you is I don't think things are quite as
25 simple as they seem. And I'd like to provide the Court some

1 written material to further the arguments I have that a warrant
2 was needed from the beginning.

3 Now, I will agree there's not a lot of case law on
4 that, but there is some. And that case law is relevant. There
5 are also Law Reviews written by very bright, intelligent
6 academics on this same matter. There are also cases that relate
7 to this that are analogous that I have constructed an argument
8 on, but that argument needs to be presented to this Court in a
9 written format for it to make sense and for it to be evaluated in
10 a meaningful way. And all I would like the Court to do is to
11 evaluate that argument in a meaningful way.

12 THE COURT: No, I don't think so. I think, I mean,
13 today was the motions hearing and that's the way the system
14 works.

15 MR. FEIN: Well, the system doesn't always work that
16 way. So, for example, when matters are slightly complicated, it
17 is not uncommon at all for a judge to give the defendant time to
18 file a post-hearing memorandum.

19 THE COURT: No, it's not uncommon but I'm not going to
20 do it in this case.

21 MR. FEIN: Okay. Well, then, here's what I will do. I
22 will make an argument to you now and I will file a motion to
23 reconsider and the Court can do with it what it will. But I'll
24 file that motion to reconsider because I have an inclination of
25 where we're going.

1 So here's what I would say, Your Honor. According to
2 the testimony -- so, a couple of things.

3 Let's start at the outset. The government has an
4 investigation. That investigation includes copying of data, that
5 is data that belongs to Freenet users. That data consists of
6 some metadata. The metadata would be the date and the timestamp.
7 It would also be the IP address. And I have no quarrel with the
8 argument that individuals don't necessarily have a reasonable
9 expectation of privacy or subjective or objective in their IP
10 addresses.

11 But the investigation in this case goes beyond that
12 because it's looking at the hash values that are involved in
13 these cases. So if I won't have the opportunity to make a
14 written submission, it will take a little bit of time.

15 So the hash values are important for a couple of
16 reasons. So let's take a look at the warrant. Give me one
17 moment with my notes, Your Honor.

18 (Pause in proceedings.)

19 MR. FEIN: Forgive me, Your Honor. Okay. So if you
20 look at Page 4, Paragraph 8. So the hash values are described
21 there by Detective Rees as a, largely an alphanumeric expression
22 that is the unique identifier of a particular, a particular block
23 in these cases. So what is authenticating is the content of the
24 communication; that is, the block that relates to the total
25 files. And, in fact, detective -- detective -- Dr. Levine

1 testified that the block, the hash value associated with the
2 block is giving you content.

3 So it is true from all sorts of cases that individuals
4 do not have a reasonable expectation of privacy in metadata that
5 is non-content. But in content, they do have a reasonable
6 expectation of privacy. And, in fact, if you take a look at the
7 definition of the word "content" in the Electronic Communications
8 Protection Act, which I don't have with me, but would be happy to
9 provide the Court in a memorandum I'd like to file, you will see
10 that it sweeps within this ambit easily the definition, easily
11 the functions of a hash value in terms of equating that with
12 content.

13 You know that it means content, moreover, from other
14 aspects of the affidavit. So, for example, if you look at Page
15 8, these are the words of the author of the affidavit, which I
16 presume is Detective Rees. So it says, quote: "Your affiant has
17 previously downloaded the file with the above-referenced Shaw
18 hash 1 value from the network and knows it to be a video file
19 approximately 28 minutes and 12 seconds in length."

20 So he previously -- not as the government indicated,
21 subsequently to the investigation downloaded -- but previously.
22 So in the communication that's recorded by the government, before
23 there's a warrant, this data is recorded and set aside. That
24 data includes the hash value. The hash value is a proxy for the
25 content and reveals the content of the file, according to the

1 words of Detective Rees himself.

2 So not only is the recorded data from the modified
3 version of Freenet setting aside metadata, but is also setting
4 aside content. So if you think of that in terms of a letter
5 that's been sent through the mail, the metadata would be the
6 address, perhaps the postal division it went through, the address
7 of the sender on the back. What it would not include would be
8 the content of the file. Here, the content of the file is being
9 recorded by the government and set aside without a warrant.

10 Subsequent to that -- so, first, the data is recorded.
11 That data recordation, that copying of data and setting aside
12 without viewing it first, but moving it to the side and later
13 reviewing it, that, in my estimation, is a seizure of that data.
14 That's data that's being sent by ordinary citizens across an
15 entire system. The government is sweeping up that data. It is
16 distinguishing that data based on hash values. Setting aside the
17 content streams that do not have hash values that relate to known
18 child pornography, the content of it, keeping and recording the
19 data that does, setting it aside for another search on down the
20 road.

21 So, first, they gather that data. They search it and
22 they separate it based on hash values. That data is copied.
23 Right? So there's a seizure of that data. That data is then
24 searched. It's searched with an algorithm that's designed by Dr.
25 Levine -- right -- who did a remarkable job, no doubt, in the

1 work that he did. But that algorithm is taking that data and it
2 is analyzing that data.

3 I would ask the Court how you analyze something without
4 searching it. You certainly can't analyze a warrant affidavit
5 without searching it. You have to search it for its meaning in
6 order to determine if it establishes probable cause.

7 In this case, one has to search the data to make a
8 determination. That determination is who, in all statistical
9 probability, is the requester, as opposed to the relayer, of that
10 particular piece of information? That algorithm has to conduct a
11 search to do that.

12 So there is a seizure of data. There is a search of
13 that data.

14 The first search separates the data into two classes of
15 individuals, those with hash values that relate to child
16 pornography, those with hash values who do not. That second
17 class of information of data is then searched again by an
18 algorithm. That algorithm is designed to tell you, within some
19 degree of statistical probability, who is the requester, as
20 opposed to a relayer of that information. Once that information
21 is known, the government goes and applies for a warrant.

22 My suggestion to the Court is that by virtue of copying
23 that data, setting aside that data, there is a seizure of that
24 data. By virtue of running, by virtue of that original
25 demarcation or separation, there is a search of that data. There

1 is a subsequent more refined, more, much more highly refined
2 search of that data by the algorithm. Only then does the
3 government get a warrant.

4 To me, that's too late in the day. Right? There's
5 been a search, there's been a seizure of data that belongs to
6 private individuals in which they have a reasonable expectation
7 of privacy because it is related to content, not simply just
8 metadata. So that's number one.

9 Number two. Let's take a look at the warrant, which I
10 would have liked to question someone about, but I understand
11 we'll just look at what we have here. So Dr. Levine testified
12 about two things. It is critical to know how many blocks are
13 involved in a given file, that is how many blocks comprise the
14 total file, and how many blocks -- forgive me -- how many blocks
15 comprise the total file and how many blocks were requested by a
16 given individual to help determine, through the algorithm,
17 whether or not that individual is a relayer or a requester. So
18 let's take a look at the affidavit.

19 So if the Court turns to Page 7, it says, quote: "Your
20 affiant observed that, on a particular date, a computer running
21 the network software at IP address X requested from the network,
22 law enforcement notes, 84 parts or blocks of the file named" and
23 there's a file name with the hash tag.

24 Okay. So I ask you, Your Honor, where does it tell me
25 in there the total number of blocks involved in that file? All I

1 have are the number of blocks that were requested. Dr. Levine
2 said there would be no way to make the probable cause, to make a
3 determination about who the requester is unless you knew the
4 total number of files.

5 Now, that same language is repeated on Paragraphs 7, 8,
6 and 9, in each and every one of the paragraphs that the
7 government says relate to specific probable cause. So if this is
8 specific probable cause, it's omitting some rather important
9 information.

10 Now, the point is this. A judge in a case, when they
11 issue a warrant, isn't supposed to simply say, well, could there
12 be probable cause? A judge is supposed to make an independent
13 evaluation as to whether or not probable cause exists. To make
14 an independent evaluation, a judge must know the information on
15 which probable cause is based.

16 Probable cause, in cases like this, where Freenet is at
17 use and the algorithm is being used, depend upon the number of
18 blocks requested in part, and the total number of blocks involved
19 in a given file. If you only know one part of that information,
20 you cannot independently evaluate whether or not probable cause
21 exists. You can say I will trust the officer, but that is not an
22 independent evaluation of probable cause. That's trusting an
23 officer. That is not the purpose of a search warrant.

24 So, for example -- well, I'll save this for a moment.

25 Now, another problem with the warrant that would, in my

1 estimation, according to Dr. Levine again, these agents are
2 trained in how to use modified Freenet. There's a program they
3 go through. They know what they're doing. Presumably he would
4 know, that is Officer Rees would know, that to make the
5 determination as to whether or not an individual is a requester,
6 as opposed to relayer, you need to know the total number of
7 blocks. By not providing that number to the judge, the judge
8 cannot make that particular determination.

9 Detective Rees should know, also, based on his training
10 and experience, that without that number, that determination
11 can't be made. If that determination can't be made by the
12 officer, then a reasonable officer in his position should know
13 that the warrant is not sufficient on its face because the
14 probable cause determination cannot be made without that number,
15 without that figure.

16 That brings me to another point in the affidavit. So
17 we look again, also on Page 7. And this is the first paragraph,
18 Paragraph Number 1. While reviewing requests received by
19 undercover law enforcement knows your affiant's observed IP
20 address, X, routing and/or requesting -- not sure which --
21 suspected child pornography file blocks. And here is a critical
22 phrase -- forgive me -- sentence. The number and timing of the
23 request was significant enough to indicate that the IP address
24 was the apparent original requester of the file.

25 Now, for it to be significant enough, you again not

1 only need to know the number of blocks requested, but the total
2 number of blocks that comprise the file, material that is
3 completely absent from the affidavit and which would make it
4 impossible for a judge to make an independent determination as to
5 whether or not probable cause existed in this particular case.

6 Number two. Look at that sentence carefully. The
7 number and timing of the request was significant enough.
8 Significant enough for whom? Significant enough for the officer
9 who applied? Because a judge can't make any determination about
10 what "significant enough" means.

11 Let's go back to my little example about the drug case
12 with the magistrate who is listening to an officer who applies
13 for a warrant. And the officer says I've been camped out in
14 front of individual A's home, who lives on One Street, and I saw
15 people coming and going from that home. And the rate at which
16 they were coming and going was significant enough for me to
17 determine that probable cause exists drugs are being sold from
18 the home.

19 Okay. How many people is significant enough? That
20 would not be information on which a judge could rely to determine
21 that the traffic to and from that home was, in fact, indicative
22 of drug activity. It would be sufficient for the judge to
23 determine that it was enough for the officer, but certainly not
24 enough for the judge to make that independent evaluation that the
25 Fourth Amendment requires.

1 A judge is interposed between the officer and the
2 warrant because officers are engaged in a competitive event, and
3 that is to ferret out crime. And you want to have a neutral and
4 detached magistrate to place themselves between them to make a
5 reasoned decision about whether or not probable cause exists.

6 Significant enough for whom? That can't be sufficient
7 for a judge because a judge wouldn't know what "significant
8 enough" means. I don't know what "significant enough" means.

9 Moreover, it can't mean much here because what leads to
10 a significant probabilistic outcome is knowing both the number of
11 blocks requested and the total number of blocks that comprise the
12 file. And nowhere for any of the five, six, seven files that are
13 cited are the total number of blocks listed. So how could
14 somebody make the determination based on just the information of
15 the blocks requested, but not the total number of blocks, that
16 this was sufficient enough or significant enough to establish
17 probable cause unless the judge was simply relying on the word of
18 the officer?

19 Now, I will grant you this is pretty long. This has
20 got a lot of words in it. But the number of words doesn't tell
21 you anything about what it actually says and whether or not it
22 conveys information that is significant to the probable cause
23 determination. So, for example, the government notes that if you
24 look at Page 4, there are definitions. Well, indeed there were
25 definitions. They tell me something about what words mean. That

1 is helpful.

2 On Page 5, there is some background. That background
3 can be helpful, too. It tells me about how the network
4 functions. Largely functions in accord with what Dr. Levine had
5 to say earlier.

6 So, okay, we know something about how it functions.
7 What we don't know is how, really, the algorithm functions in any
8 particular way. But what we do know from the testimony is that
9 the algorithm is useful only when you have certain data. And to
10 evaluate whether or not probable cause in a case exists to
11 distinguish between a relayer and requester, you need a certain
12 amount of information to make that independent evaluation. And
13 the information that's required to make that determination is
14 absent from this warrant.

15 So I think this warrant is complicated and I think the
16 issue is complicated. And I think it would have been reasonable
17 for me to ask the judge, Cavanaugh, from the state if she truly
18 had understood what she read. It's a factual question. Maybe
19 she would have said yes. Maybe she would have said no. I'm not
20 allowed to ask that question, I understand.

21 But at this point we're left with the affidavit. The
22 affidavit doesn't contain enough information. The affidavit
23 tells you that it was significant enough for Officer Rees, but it
24 doesn't tell you why it was because it doesn't contain the
25 information Dr. Levine says you would need.

1 If the government wants to engage in search and
2 seizures that are somewhat complicated, they're certainly free to
3 do so. I have no quarrel with that. But what they need to do is
4 when they to supply a warrant or an affidavit to a judge to
5 obtain a warrant, they need to give the judge sufficient
6 information to make the determination.

7 All it would have needed to say was, here are the
8 number of blocks requested. Here were the total number of blocks
9 in the file. Based on an algorithm that determines a statistical
10 probability, we believe more likely than not that this is the
11 person who requested those files. It doesn't say that.

12 It doesn't require some very technical, difficult
13 language. Some very basic English would do. But it's not in
14 there. It needs to be for a judge to make an independent
15 probable cause determination. That is the point of the Fourth
16 Amendment.

17 So I understand the Court isn't going to give me an
18 opportunity to write about my first argument, which is simply
19 that I do believe there was a search and seizure, at least
20 arguably, from the outset, that the government needed a warrant
21 to conduct. We still live in a country governed by rules,
22 governed by laws. The Fourth Amendment says before there's a
23 search and seizure of somebody's effects, papers, that a warrant
24 should issue.

25 I believe that effects and papers were seized and I

1 believe they were searched, and I believe they were done so
2 without a warrant.

3 Subsequent to that, a warrant was, a warrant was issued
4 by a state court judge, but that warrant as issued on an
5 affidavit that did not contain sufficient information for her to
6 make a probable cause determination. And just as importantly, it
7 didn't have enough information for an officer who's trained in a
8 Freenet investigation -- did have enough information that he
9 should have understood that was lacking in probable cause on its
10 face because it didn't contain the information related to the
11 variables that are most important. Only had half of the
12 equation -- the number of blocks requested, not the total number
13 of blocks. And told the judge basically, rely on me, it was
14 significant enough.

15 Now, I'll make another point about this. This has to
16 do with some of the cases the government pointed out in its
17 motion to, in limine to exclude Judge Cavanaugh. There was a
18 conclusory statement. To say that the, to say that the timing
19 and frequency was significant enough to make this determination
20 is a conclusory statement.

21 In Wilhelm, one of the cases pointed out by the court,
22 by the government in its motion in limine, the Fourth Circuit
23 upheld suppression of a warrant because the warrant was too
24 conclusory. The court said the judge abdicated her role or his
25 role, in that case, as a neutral and detached magistrate because

1 the judge simply relied on conclusory statements.

2 If there are 10,000 statements in here, it matters not
3 if the statements that are important to the probable cause
4 determination are insufficient. And the statements that are
5 important here for the probable cause determination are
6 insufficient and conclusory. Significant enough to determine who
7 the likely requester was. It doesn't -- I don't want to get
8 overly repetitive. I'm afraid I'm already there.

9 I don't know how a judge can say I'm making an
10 independent evaluation based on this person telling me that it
11 was significant enough. How is a judge to independently evaluate
12 that something is sufficient when all they know is someone else
13 says it's significant enough?

14 So --

15 THE COURT: Mr. Johnson, do you want to say something?

16 MR. JOHNSON: No, Your Honor.

17 MR. FEIN: Forgive me, Your Honor. One moment.

18 (Pause while Mr. Fein confers with the defendant.)

19 MR. FEIN: So Mr. Hall reminded me of something
20 important, too. So forgive me. This is why I really wanted to
21 provide something in writing to the Court, because I think
22 there's a lot to say about these issues that really can't be,
23 that territory can't be meaningfully covered in 20 or 30 minutes.
24 And I don't want to take the Court's whole day.

25 I would like to provide the Court something in writing

1 about this because I think it's a meaningful and important issue.

2 If you take a look at the -- well, I can barely read
3 that. Forgive me. Okay. So forgive me. It's just the first
4 page of Government's Exhibit M-1. And it's the first page of
5 Freenet. Right on there it says that Freenet, browse Freenet
6 user with heightened security, with significant security.

7 But again, if you go over to the warrant -- this is
8 going back to different issue. I guess this is going back to the
9 government's claim that because Mr. Hall is a sophisticated man
10 when it comes to computers, he would forego any subjective
11 expectation of privacy which, to me, I don't think there's any
12 case law that would support that.

13 But if you look at Page 5, Paragraph B, it says the
14 network is distributed in an internet peer-to-peer network, which
15 attempts to let a user anonymously share files. Communications
16 between computers. The very communications that are intercepted
17 by the modified Freenet are encrypted and routed through other
18 networks, making it difficult to determine who the requester is.

19 The whole point of Freenet is to provide an anonymous
20 system by which individuals can share information. Was developed
21 by a gentleman in Ireland. And the point was for people in
22 political repressed societies to be able to share information
23 without necessarily having the government know what they're
24 sharing.

25 In any event, you can see from the affidavit and the

1 writing I'll file to reconsider later, I guess, I'll point out in
2 the affidavit where it talks about the anonymity that is expected
3 by its users, like Mr. Hall and all others, and the encryption
4 that is involved, that Dr. Levine testified to.

5 In any event, Your Honor. I think it's a complicated
6 matter. I think it's a serious matter. I think a warrant was
7 needed from the outset. I think the affidavit is insufficient,
8 insufficient for a judge to make the probable cause determination
9 based on the language. I think that a reasonable, reasonably
10 objective officer in the position of Detective Rees, who's been
11 trained in, presumably, in the modified Freenet investigation
12 technique, should have known that it would be important for a
13 judge to make an independent evaluation based on the number of
14 blocks requested and the total number of blocks in the file since
15 that is a critical piece of the information.

16 So for today, I'll leave it at that, Your Honor. I'll
17 ask the judge to recognize that a warrant should have been issued
18 at the outset. I will ask the judge to recognize that the
19 warrant is, affidavit from the perspective, the affidavit is
20 insufficient from the perspective of an objectively reasonable
21 officer. I'll ask the judge to recognize that the ultimate
22 language relates, was conclusory and rendered it impossible for
23 the judge to make an independent evaluation of probable cause.

24 THE COURT: Well, I'm going to deny the motion to
25 suppress. To the extent that there's an allegation that the,

1 that the pre-warrant investigation was improper, I credit Dr.
2 Levine's testimony that Freenet, in terms of what it warns,
3 makes, makes the information not private, and there's no
4 expectation of privacy.

5 In terms of the affidavit, it's fully sufficient to
6 satisfy the elements of probable cause. I will say that even if
7 it weren't, the issuance of the warrant would be sufficient under
8 Leon.

9 Pages 7 to 10 of the affidavit are replete with
10 probable cause to believe that child pornography was involved. I
11 am not persuaded that the judge had to understand or get into the
12 number of blocks that were involved. I mean, it's, it's there in
13 the affidavit. And the judge could rely upon it to establish
14 probable cause.

15 So I deny the defendant's motion to suppress evidence.

16 MR. BUDLOW: Thank you, Your Honor. Move on to the
17 next motion, which is the defendant's motion to suppress the
18 defendant's statement. The government calls Detective Joshua
19 Rees.

20 MR. FEIN: If I may, just for the record, Your Honor,
21 just to object to the Court's ruling.

22 THE COURT: Of course.

23 MR. FEIN: In addition, would it be okay with the
24 Court, I would like to file a motion to reconsider. May I have
25 time to do so?

1 THE COURT: You can may file a motion to reconsider.

2 MR. FEIN: Thank you, Your Honor.

3 THE CLERK: Good afternoon, sir. Please raise your
4 right hand.

5 DETECTIVE JOSHUA REES, GOVERNMENT'S WITNESS, SWORN

6 THE WITNESS: Yes, I do.

7 THE CLERK: Thank you. You may have a seat. Please
8 state and spell your full name for the record.

9 THE WITNESS: Detective Joshua Rees. J-O-S-H-U-A.
10 R-E-E-S.

11 THE CLERK: Thank you.

12 MR. BUDLOW: Your Honor, I apologize for the bad
13 timing. But if you were planning on an afternoon recess, now
14 would be a pretty good time.

15 THE COURT: You want to take a recess?

16 MR. BUDLOW: Yes, please.

17 (Recess at 3:04 p.m. Resume at 3:13 p.m.)

18 THE COURT: Yes, Mr. Budlow.

19 DIRECT EXAMINATION

20 BY MR. BUDLOW:

21 Q Detective Rees, good afternoon.

22 A Yes, sir.

23 Q Tell us how you're employed.

24 A I'm employed by the Baltimore County Police Department.

25 Q And tell us how long you've been employed by the Baltimore

1 County Police Department, and just an overview of the different
2 assignments you've had since you've been there.

3 A Yes, sir. I've been employed with the Baltimore County
4 Police Department since March of 2001. I worked uniform patrol
5 until June of 2007. June of 2007, I was assigned to the Violent
6 Crimes Unit until March of 2008. I was assigned to the Crimes
7 Against Children's Unit, which is where I still currently work.

8 Q And what did you do before you were in the Baltimore County
9 Police Department?

10 A I was a minor league baseball umpire.

11 Q I want to ask you if you were the lead detective into the
12 investigation that led to the search warrant at [REDACTED]
13 [REDACTED] in Reisterstown, Maryland?

14 A Yes, sir, I was.

15 Q And that occurred on September the 7th, 2016, the execution
16 of that warrant?

17 A Yes, sir.

18 Q And when you executed the search warrant, was an individual
19 named Martin Hall present in the residence?

20 A Yes, sir.

21 Q Did you ultimately conduct an interview of Mr. Hall during
22 that execution of that search warrant?

23 A Yes, I did.

24 Q Do you see Martin Hall here in the courtroom today?

25 A Yes, I do.

1 Q Could you point to him and identify him for the record?

2 A He is seated in the middle of that table, wearing a maroon
3 jumpsuit.

4 Q For the record, identifying the defendant, Your Honor. Can
5 you tell His Honor about when and how the search warrant was
6 initially executed?

7 A Yes, sir. The search warrant was a knock and announce
8 warrant. It was executed at approximately 5:00 on the morning on
9 September 7th of 2016. Myself and other members from my unit
10 were present for the service of the search warrant, along with a
11 uniformed police officer and a marked police car.

12 I knocked and announced on the door at [REDACTED]
13 and announced, "Police, search warrant."

14 Q It's 5 a.m., you knocked on the door, "Police, search
15 warrant." I'm assuming you didn't say it in the same tone of
16 voice you just said it now?

17 A No, sir, I did not.

18 Q What tone of voice did you use?

19 A Very loud.

20 Q What happened?

21 A Eventually, we got an answer at the door from Mr. Hall.

22 Q And can you describe how many people were at the door, what
23 they were wearing, the status of their weapons, things like that?

24 A Sure. At the door would approximately be five or six
25 people. The marked police car was parked in the driveway of the

1 home with its red and blue light flashing to make sure they knew
2 we were the police department.

3 At the time that I knocked and announced, my weapon's
4 holstered. Behind me would be two detectives with shields and
5 their weapons would be unholstered.

6 Q And in what position?

7 A In like a low ready position.

8 Q What does that mean?

9 A Kind of held down by their leg. Not pointed at anybody in
10 particular.

11 Q And is what you've described so far in terms of the knock
12 and announce and the way the house was approached and status of
13 weapons routine procedure for the execution of a search warrant
14 in Baltimore County?

15 A Yes, sir.

16 Q What happened when the defendant came to the door?

17 A He was asked to step outside.

18 Q And did he do so?

19 A Yes, he did.

20 Q Make any comments at that time?

21 A Just asked what we were there for. We said we have a search
22 warrant and asked him to step outside.

23 Q What happened next?

24 A His wife came down the stairs behind him and she was asked
25 to step outside.

1 Q And then what?

2 A We asked him if there's anyone else in the home before we
3 enter the home and clear it.

4 Q What does it mean to enter the home and clear it?

5 A To search the home for other people.

6 Q And did that occur?

7 A Yes, it did.

8 Q Roughly how long did that take?

9 A It took approximately 15 minutes. It's a larger home.

10 Q Can you describe the home?

11 A A colonial style home. You enter into a foyer with stairs
12 that go straight up to the second level. There was a living room
13 to the right, an office to the left as you entered the home. On
14 the other side of the living room, if you went past the living
15 room, was a dining room. And that would all be on the right side
16 of the first floor. If you go into the house to the left past
17 the stairs, you come into the kitchen, where there was a family
18 room and then like a breakfast or eat-in kitchen area behind the
19 kitchen.

20 Upstairs were several bedrooms. The master bedroom was
21 the furthest bedroom to the left upstairs. Before you got to the
22 master bedroom was a smaller guest bedroom. And then I believe
23 there were two other bedrooms upstairs, one kind of straight
24 ahead and one to the right.

25 Q Four bedrooms upstairs?

1 A I believe there were four. I could refer to the sketch to
2 give you an exact number.

3 Q That's okay. Was there a basement?

4 A Yes, there was a basement, a finished basement.

5 Q You said finished or unfinished?

6 A It was completely finished.

7 Q This was a large home?

8 A Yes, it is, in my opinion.

9 Q And what size plot of land was it on?

10 A A rough guess for me would be three-quarters of an acre.

11 Maybe there's more because I believe there's a wood line in the
12 back.

13 Q So when the house was cleared, meaning the officers went in
14 to make sure there was nobody else present, in fact, that's what
15 they found out? That nobody else other than the defendant and
16 his wife were present?

17 A That's correct.

18 Q Where did they remain during the time of the house being
19 cleared?

20 A They were out front.

21 Q So after that 10 to 15 minutes of clearing the house, what
22 occurred next, specifically with respect to the defendant and his
23 wife?

24 A They were asked to come back in and asked to have a seat on
25 the red couch in the living room.

1 Q Other than being asked to step outside the home, when they
2 were outside the home were they restrained in any way?

3 A No, sir.

4 Q Were they physically handled in any way?

5 A No, sir.

6 Q And what about in terms of how they got from outside back
7 inside the home?

8 A They were asked come back inside.

9 Q And did they?

10 A Yes, they did.

11 Q And again, were they restrained in any way, handcuffs or any
12 other forms of restraint?

13 A No, sir. At no time was anyone handcuffed.

14 Q And did they agree to come inside the home?

15 A Yes, they did.

16 Q Where did they go?

17 A To the living room.

18 Q What did they do there?

19 A They sat on the couch.

20 Q And what did you do?

21 A I went, after that home was cleared, I went back outside to
22 my vehicle, took my vest off, and got my case folder.

23 Q And did you go back inside?

24 A Yes, I did.

25 Q Can you describe the scene, what it was like inside when you

1 went back in?

2 A I went back inside. The other members of our squad had
3 their vests off. And the beginnings of the search warrant
4 procedure were taking place. Pictures were being taken. There
5 were people doing assigned duties at the beginning of a search
6 warrant.

7 Q And specifically what was going on inside the living room
8 where the defendant and his wife were seated?

9 A I was talking to them. I read them the search warrant.

10 Q But as you first walk in, before you're reading the search
11 warrant at the scene, hectic because there's a lot going on? Is
12 it more calm, more loud?

13 A It's more calm. It's not loud.

14 Q Can you tell us again what you did?

15 A I read them the search warrant out loud.

16 Q Meaning the entire affidavit or just the part that
17 authorized the search?

18 A Just the part that authorized the search.

19 Q And how many pages is that?

20 A Three.

21 Q Did you introduce yourself first?

22 A Yes, I did.

23 Q Who did you tell them you were?

24 A Detective Rees from Baltimore County Police Department.

25 Q Did you tell them which division you were in or what types

1 of cases you handled?

2 A Not at that time. I did not tell them I was from Crimes
3 Against Children.

4 Q Then you read the entire search warrant itself. How many
5 pages did you say that was?

6 A Three pages.

7 Q All right. Does it include the types of crime or types of
8 evidence that you would be looking for in the search?

9 A Yes, it does.

10 Q What did you do after you read the search warrant out loud?

11 A I asked them if they had any valuables or large sums of
12 money that they wished to have brought out and set before them,
13 before we search.

14 Q And what did they say?

15 A They said that they did not.

16 Q What was your tone of voice during this time when you read
17 the search warrant and asked them about valuables?

18 A It was conversational.

19 Q What did you do next?

20 A I advised them of their rights per Miranda.

21 Q When you say you advised them of their rights per Miranda,
22 first of all, do you know those rights by heart?

23 A I do know them by heart, but I read them from a card.

24 Q And do you carry the card with you in your wallet or your
25 identification whenever you're on duty?

1 A In my case folder.

2 Q And so in this case, did you pull the card out and literally
3 read from the card?

4 A Yes, I did.

5 Q And do you have it with you?

6 A Yes, I do.

7 Q Could you read it for us now the way you read it to them on
8 September the 7th, 2016?

9 A Yes. You have the absolute right to remain silent.

10 Anything you say can and will be used against you in a court of
11 law. You have the right to talk with a lawyer at any time before
12 and during any questioning. If you want a lawyer and cannot
13 afford one, you can request the Court to appoint a lawyer prior
14 to any questioning. If you agree to answer questions, you may
15 stop at any time and no further questions will be asked of you.

16 Q And what happened after you read those rights to the
17 defendant and his wife?

18 A I asked them both if they understood their rights.

19 Q You asked them together as a group or individually?

20 A Together as a group, but I looked at each one of them for
21 acknowledgement.

22 Q Do you remember what you said to, how you asked them if they
23 understood their rights?

24 A Do you understand your rights?

25 Q And did the defendant respond?

1 A He said yes.

2 Q And did his wife respond?

3 A Yes, she did.

4 Q What did she say?

5 A She said yes.

6 Q During that period of time, did anybody mention an attorney
7 or desire to see an attorney or talk to an attorney?

8 A No, sir.

9 Q What happened next?

10 A I asked them if there's anyone else that resides in the home
11 that was not there at that time.

12 Q Did you get a response?

13 A Yes.

14 Q What was the response?

15 A That there is not.

16 Q And then?

17 A I asked them who their internet service provider is.

18 Q And what, if anything, did the defendant -- well, first of
19 all, how did you ask that question?

20 A Who is your internet service provider.

21 Q And did the defendant provide a response?

22 A Yes, he did.

23 Q What did he say?

24 A I do not want to answer that question.

25 Q I do not want to answer that question. That was his

1 response?

2 A Yes, sir.

3 Q Did he say anything to you else other than that at that
4 moment in time?

5 A No, sir.

6 Q Did his wife say anything to you in response to that
7 question, who is your internet service provider?

8 A No, sir.

9 Q Is that a question -- so far, what you've described, is this
10 a routine that you do -- this is a bad question. I have to
11 rephrase that. Is this the procedure that you do regularly when
12 you execute a search warrant?

13 A Yes, sir.

14 Q What happened next?

15 A Next we asked Mrs. Hall to come to the kitchen area.

16 Q And can you describe how you asked her and what happened?

17 A Could you please come to the kitchen with me? And she did.

18 Q Did she respond verbally or did she just get up and follow
19 you to the kitchen?

20 A She got up and followed me.

21 Q And then where is the kitchen in relation to the living room
22 where Mr. Hall was, the defendant?

23 A You go back to a room, to the dining room, and then I
24 believe left was the kitchen. And I think we went in past the
25 kitchen, eat-in kitchen area.

1 Q Without telling us the substance of it, what occurred when
2 you were with the defendant's wife in the kitchen?

3 A I had spoke to her about the internet in the home, the
4 computers in the home, who uses what computer, where the
5 computers are. And I explained what we call the triage process.

6 Q Did she answer your questions?

7 A Yes, she did.

8 Q And roughly how long were you with her? And this would have
9 been outside the defendant's presence?

10 A Yes, sir. At that, that interview, maybe 10 minutes at the
11 most.

12 Q And where was the defendant during those at the most 10
13 minutes?

14 A In the living room on the couch.

15 Q Was anybody with him?

16 A Lieutenant Wiedeck.

17 Q When did the initial interaction with the defendant and his
18 wife take place in terms of you advising them of their Miranda
19 rights? Roughly what time was that?

20 A That would be approximately 5:15 in the morning.

21 Q When you finished talking to Mrs. Hall sometime a little bit
22 after that, I think you said up to ten minutes after that, where
23 did she go?

24 A She went with Detective Keaton. I don't know where exactly
25 she went. I turned my focus to other things.

1 Q Do you know if the defendant remained in the living room
2 where he was?

3 A Yes, he did.

4 Q Generally, can you describe just an overview of what
5 occurred from roughly 5:20 or 5:25 in the morning, for the next
6 three hours?

7 A The, what we call the forensic triage process and the
8 search.

9 Q And did your search and forensic triage focus on a
10 particular area of the house?

11 A Yes. It ended up focusing on the office in the basement.

12 Q And what were you doing during those three hours?

13 A Conducting forensic triage of a laptop computer with a hard
14 drive attached to it, as well as other computers. There were
15 multiple computers and devices in that office. So I was
16 assisting Detective Raut and Forensic Supervisor Coleman with the
17 forensic triage.

18 Q Did you remain in the basement the entire time or were you
19 walking in other places throughout the home?

20 A I think I went back upstairs maybe once or twice, but
21 essentially remained in the basement.

22 Q And when you went upstairs, did you see the defendant? If
23 so, can you tell us what he was and what he was doing?

24 A He was seated in the living room on the couch.

25 Q As far as you know, was he free to leave?

1 A As far as I know, he was free to leave, yes.

2 Q Was he restrained in any way?

3 A No, sir.

4 Q Did you notice any handcuffs on him?

5 A No.

6 Q Were any of the officers that you saw in his presence
7 displaying firearms or other weapons?

8 A No, sir.

9 Q And if they had them, do you know where they were?

10 A If -- I'm sorry. The question?

11 Q Do you know if they were armed?

12 A All the officers were armed, yes.

13 Q Do you know how they displayed, how they carried their
14 firearms at that time?

15 A Our, the people I work with in my squad, we wear jeans and
16 T-shirts, essentially. So our guns are covered by T-shirt or
17 whatever shirt we're wearing.

18 Q And is that a conscious decision to cover the firearms?

19 A Yes.

20 Q Did you notice if, during that period of time, any time
21 during the three hours that we're referring to after you spoke to
22 the defendant's wife, if anybody was speaking to the defendant?

23 A I'm not aware if anyone was.

24 Q And did you see him speaking to anyone else?

25 A I did not see him speaking to anyone else.

1 Q Did there come a time when you asked the defendant to speak
2 to you?

3 A Yes.

4 Q And approximately what time was that?

5 A It was approximately three hours later. Sometime around
6 8:30 in the morning. I don't know the exact time off. I think
7 it would be maybe documented.

8 Q Do you have a record that would, do you have any documents
9 with you that would refresh your recollection as to when it was
10 that you, approximately when it was that you initiated the
11 conversation?

12 A I don't think I have a document that I have with me at the
13 moment that says that. I know it was sometime around 8:30 in the
14 morning.

15 Q And where was the defendant at the time that you initiated
16 this conversation?

17 A In the living room on the couch.

18 Q Tell us what you did.

19 A I asked him if I could speak with him.

20 Q And then?

21 A He said yes. And then we went upstairs to the first bedroom
22 on the left.

23 Q How did you manage that? Did you ask him to follow you?
24 Did you tell him where to go?

25 A I don't remember my exact words, but I know I went up first.

1 Maybe I asked him to follow me. I asked him to come upstairs.

2 Q And who were you with, if anyone, other than the defendant?

3 A Detective Adamski at the beginning of that.

4 Q All right. When you asked him if he would speak with you,
5 what did he say, if anything?

6 A He said he would.

7 Q And then he followed you upstairs?

8 A Yes, sir.

9 Q Where did you go upstairs?

10 A The first bedroom on the left.

11 Q Did the defendant display any hesitation to speak with you
12 or to follow you upstairs into the bedroom?

13 A No, sir.

14 Q And can you describe the bedroom where the interview took
15 place?

16 A There was a bed on the right up against the wall. At the
17 foot of that bed there was a space and then a closet. The wall
18 that the bed was up against, at the far end of the room, there
19 was a window and a chair. I sat in that chair there by the
20 window.

21 Q Where was the other detective?

22 A Detective Adamski, I believe, was over on the side where the
23 bed was.

24 Q And where did the defendant sit?

25 A He sat in a chair closest to the door.

1 Q And was the door open or closed?

2 A It was closed.

3 Q And do you know if the door had a lock on it?

4 A I don't know if it had a lock.

5 Q Was the door locked?

6 A Not that I was aware of.

7 Q And how did you decide who sat where?

8 A I don't know how I made that decision. I think because I
9 walked in the room first, I sat in the furthest chair.

10 Q And was the defendant in custody in any way during the
11 interview?

12 A No, he was not.

13 Q Was he told that he had to participate in the interview or
14 told that he had to answer your questions?

15 A No.

16 Q Was the interview recorded?

17 A Yes, it was.

18 Q Was the defendant advised of his Miranda rights again at the
19 beginning of this interview?

20 A Yes, he was.

21 Q And why is that?

22 A That's our standard procedure, is to advise everyone of
23 their rights before we interview them.

24 Q Even after, it's also your standard procedure to advise them
25 initially as a group?

1 A Yes, sir.

2 Q When you advised him of his rights a second time, did he
3 appear to understand you?

4 A Yes, he did.

5 Q Did he agree to speak with you even after being advised of
6 his Miranda rights?

7 A Yes.

8 Q Madam Clerk, could we switch to the government's computer?
9 Detective Rees, have you had an opportunity to listen to the
10 recording of this interview?

11 A Yes, I have.

12 Q Is it consistent with your memory of the activity?

13 A Yes, sir.

14 Q So, Detective, I want to reference this file that you're
15 looking at on the computer right now, which is a VLC file. First
16 of all, are you familiar with video files such as VLC media
17 files?

18 A Yes.

19 Q And have you listened to this recording that, at least on
20 this computer, is named Martin Hall?

21 A Yes, I have.

22 Q And do you know generally, have you noticed if, when you
23 take the recordings and put them on to the computer, if the time
24 and date stamp on the file is generally accurate?

25 A Yes, because my audio recorder, I set the date and time and

1 I make sure that that's accurate.

2 Q In looking at this screen in front of you, does that reflect
3 the same date that the search warrant was executed in this case?

4 A Yes, it does.

5 Q And what is the time that you see indicated as the date of
6 this file?

7 A 8:56 a.m.

8 Q Do you know if that's the beginning or the end of the
9 recording?

10 A That would be the beginning.

11 Q And how do you know that's the beginning? Is that based on
12 the length of the interview?

13 A Because that's when the file was created.

14 Q And your experience is the file names on these reflect the
15 correct date and the correct start date of the recording?

16 A Yes.

17 Q Court's indulgence. Your Honor, at this time I would ask
18 Ms. Shoop to play the first minute-47 of this. Before she hits
19 play, I would point out to the Court that in Government's Exhibit
20 M-7 that Your Honor has, and I can provide another copy if you
21 need it, it has a transcript, it is a transcript that includes
22 this first roughly minute and 47 seconds --

23 THE COURT: Okay.

24 MR. BUDLOW: -- that we will be playing. Go ahead.

25 Thank you.

(Audio playing.)

BY MR. BUDLOW:

Q Detective, you heard the recording, right?

A Yes, sir.

Q In the introduction, you confirmed that you had previously read the defendant his rights?

A Yes, sir.

Q You also said that you had asked him about the internet provider, right?

A Yes, sir.

Q And on the recording, you said that Hall had told you that he didn't want to answer any more of your questions. That's what you said, right?

A Yes, sir.

Q But you testified just a few moments ago that you, that he told you that he didn't want to answer "that question." Can you explain the difference, why the recording says "you didn't want to answer any of my questions", but you've testified that it says "you didn't want to answer that question relating to the internet service provider?"

A Yes, sir. And it's also documented in my police report and the statement of charges exactly what was said. At that point I think we were roughly four hours into this search warrant. We had encountered some complex situations with the hard drives and the data there, and the investigation was evolving from a child

1 pornography possession to possibly international travel and
2 sexual abuse of children.

3 At that point, I made a generalized statement to Mr.
4 Hall in an effort to engage him. I wasn't focused on quoting
5 what he had said earlier. I was just more focused on
6 generalizing what had happened prior, making sure that he
7 understood everything that happened prior that led up to where we
8 were, and going from there.

9 Q And is there any doubt in your mind sitting here today as to
10 what his response to your question of who the internet provider
11 was?

12 A There is no doubt in my mind.

13 Q And what was that response?

14 A That he did not want to answer that question.

15 Q And you mentioned in your answer a moment ago that you had
16 documented it in the police report and the Statement of Charges,
17 which is an application for Statement of Charges. You filed it
18 the same day?

19 A Yes, sir.

20 Q Under oath?

21 A Yes.

22 Q And how did you --

23 A It was later that day.

24 Q I'm sorry for cutting you off. How did you describe his
25 response to your question in those documents?

1 A I wrote that he stated that he did not want to answer that
2 question.

3 Q How long did this interview last?

4 A This particular interview here was approximately an hour and
5 11 minutes.

6 Q Can you just describe generally how the interview proceeded
7 in terms of the format and the topics? We don't need to go
8 through everything that was said.

9 A The format was a very conversational dialogue, mutual
10 dialogue where Mr. Hall was asked about, obviously, Freenet and
11 some technical things about his computers and hard drives. He
12 was asked about his travel. He was asked about his child
13 pornography activity. He was asked, you know, a multitude of
14 topics based on things that we had seen during the forensic exam
15 on scene. And he engaged me as well in his computer knowledge
16 and things like that.

17 Q Did he ask you questions, also?

18 A I think he did ask me some questions, yes.

19 Q During this roughly hour and 11 minutes, did, were any
20 breaks taken?

21 A Yes.

22 Q Can you explain why that was and what happened?

23 A Mr. Hall asked to go to the bathroom.

24 Q Did he go to the bathroom?

25 A Yes.

1 Q And how did he get there and where's the bathroom in
2 relation to the bedroom where the interview was taking place?

3 A If I remember correctly, the bathroom was across the hall.
4 And he was told he could go in and go to the bathroom.

5 Q And who, if anyone, escorted him to the bathroom?

6 A I did not escort him. I think at that point Detective
7 Adamski was still in the interview. He probably walked Mr. Hall
8 out. No one went into the bathroom with him. We don't go into
9 the bathroom with people. We make sure the bathroom's been
10 searched, there's nothing in there. We let them go in. So no
11 one stands guard inside the bathroom or anything like that.

12 Q He was allowed to close the door when he was in the
13 bathroom?

14 A Yes.

15 Q Did anyone else enter the room during the interview?

16 A Yes. At that break, I believe Detective Adamski had to
17 leave for court and Lieutenant Wiedeck came into the interview.

18 Q And during this interview, did the defendant appear to
19 understand that the interview was voluntary?

20 A Yes.

21 Q And that he didn't have to answer your questions?

22 A Yes.

23 MR. FEIN: I object, Your Honor. That calls for a
24 conclusion.

25 THE COURT: Overruled.

1 BY MR. BUDLOW:

2 Q Did there come a time specifically where he demonstrated his
3 understanding that he didn't have to answer your questions?

4 A Yes, there did.

5 Q Describe it. Go ahead. You describe it first.

6 A I asked Mr. Hall for the encryption password for his
7 external hard drive.

8 Q Your Honor, I draw your attention to the last two pages of
9 the Exhibit M-7, which is, although it's not this long of an
10 exhibit, it's marked as Pages 36 and 37 of the transcript. And
11 specifically, it's going to pick up probably three lines from the
12 bottom. If you could play -- roughly, this is one -- I'm sorry.
13 It's at timestamp 4739, is what we're going to play.

14 (Audio playing.)

15 BY MR. BUDLOW:

16 Q Did he ever provide you with that password?

17 A No, sir.

18 Q Can you describe the defendant's demeanor throughout the
19 interview?

20 A He was conversational, appeared to understand everything
21 that was going on.

22 Q Can you describe his physical appearance at the time?

23 A His physical appearance at the time? He appeared alert. He
24 did not appear to be under the influence of any alcohol or drugs.
25 He appeared to be in a normal state.

1 Q Now, this was early morning. You said you entered roughly 5
2 a.m., is that right?

3 A Yes, sir.

4 Q This was a few hours later, maybe four hours later. Did he
5 seem to have woken up enough that he could understand what was
6 going on?

7 A Yes, sir.

8 Q Do you know how old he was at the time?

9 A Do I know what, sir?

10 Q Do you know how old the defendant was at the time of this
11 interview?

12 A I believe he was in his early fifties. I could look at the
13 date I have to see the exact age.

14 Q Close enough. Did he tell you how he was employed or what
15 he did for a living?

16 A Yes, he did.

17 Q What did he say?

18 A He told me that he travels the world teaching Java,
19 predominantly in India and the Philippines. He also teaches Java
20 and computer programming here in America as well.

21 Q Detective, can you describe your demeanor and the other two
22 detectives' demeanors throughout the interview?

23 A It was relaxed and conversational.

24 Q At any time during the interview did the defendant ever ask
25 to have the interview ended or stop the interview?

1 A No, he did not.

2 Q What would you have done if he had asked?

3 A I would have stopped the interview.

4 Q Other than this one question relating to the encryption
5 password and the one that you told us about at the beginning of
6 the morning, did he refuse to answer any other questions?

7 A No.

8 Q Would you have described him as cooperative throughout the
9 interview?

10 A Yes.

11 Q Was his freedom to move restrained in any way from the time
12 you entered until the end of the interview?

13 A No.

14 Q Was he ever told that he could not leave?

15 A No.

16 Q Did you or the other detectives, other than entry into the
17 house at the execution of the search warrant, ever display your
18 firearms?

19 A No, sir.

20 Q At any time throughout this morning did the defendant ever
21 request to speak to an attorney?

22 A No, sir.

23 Q Did he ever ask anything about an attorney?

24 A No, sir.

25 Q Was the defendant threatened in any way to get him to

1 provide information?

2 A No, sir.

3 Q We're he made any promises so that he was promised something
4 in exchange for providing this interview?

5 A No, sir.

6 Q How did the interview end?

7 A The interview came to a conclusion where I think I was done
8 asking him questions. I explained the items that we were going
9 to seize. I explained that he was going to be arrested and what
10 the arrest process was. And then he asked some questions about
11 contacting a place that he was supposed to be teaching soon
12 thereafter, and wanted an e-mail address to try to let them know
13 he wouldn't be there.

14 Q And at the end of the interview, around the time that you've
15 just described, did you ask the defendant how he thought he was
16 treated by you and the other detectives?

17 A Yes, I did.

18 Q What did he say?

19 A I asked him if he thought he had been treated fairly and he
20 said yes.

21 Q After the interview concluded, what did you do next? I
22 guess, let me ask it another way. Was the search still ongoing?
23 Was the search completed at that time?

24 A The search was still ongoing.

25 Q Did you continue to participate in the search?

1 A Yes, sir.

2 Q At some point around there was the defendant, was he
3 immediately arrested at the end of the interview?

4 A He was not immediately arrested at the end of the interview.

5 Q What happened to him after the interview?

6 A He went back downstairs to the living room.

7 Q In cuffs? Not in cuffs?

8 A Not in cuffs.

9 Q You did say --

10 A He was not handcuffed until a uniformed police officer came
11 to transport him to the precinct.

12 Q Thank you, Detective Rees. Your Honor, that's all I have at
13 this time.

14 THE COURT: Mr. Fein.

15 CROSS EXAMINATION

16 BY MR. FEIN:

17 Q Thank you, Your Honor. The search warrant execution, that
18 was a planned event, correct?

19 A Yes, sir.

20 Q And prior to the 7th, I assume there was a team that
21 gathered in preparation for execution of the search warrant?

22 A Yes, sir.

23 Q How many members belonged to that team?

24 A There are four detectives on my squad and a sergeant. For a
25 typical search warrant, we think we take eight people.

1 Q How many people came on this occasion?

2 A I have to refer to my report and count the amount of people,
3 if that's okay.

4 Q Of course.

5 A There were eight detectives from my unit, a civilian
6 forensic supervisor, and one uniformed police officer at the
7 entry.

8 Q That would be 10 people in all?

9 A Yes, sir.

10 Q And prior to the 7th or on the morning of the 7th, you
11 didn't go to the home unprepared, correct?

12 A Correct.

13 Q You had a diagram of the house?

14 A No, sir, I did not have a diagram.

15 Q Did you have an idea how many people may live in that house?

16 A Yes.

17 Q Did you, in fact, have photographs of the people who live in
18 the house, correct?

19 A Yes.

20 Q And that would be Mr. Hall's wife, correct?

21 A Yes.

22 Q An adult son?

23 A I did have a photograph of him, yes.

24 Q And an adult daughter?

25 A Yes.

1 Q Okay. Did you have a general idea of the layout of the
2 house?

3 A No.

4 Q Did you have a plan about how people would maybe enter the
5 home, or no?

6 A How we would enter the home?

7 Q Um-hum.

8 A Yes.

9 Q Yes. Forgive me. And you arrived at, did you say 5:30
10 a.m.?

11 A 5:00 a.m.

12 Q Five a.m. And there's a reason you show up at 5 a.m.,
13 correct? There's a -- A, the person might be home but, B,
14 there's a surprise element there, correct?

15 A The first question you asked me was is there a reason that
16 we show up at 5 a.m. The answer is yes. And the second question
17 you asked me was is there, is there a surprise element?

18 Q Well, there's two points. One is a person's likely to be
19 home at that hour, correct?

20 A Yes.

21 Q But there's also a surprise element if you come at an early
22 hour like that, correct?

23 A I think most people are surprised any time the police come
24 to their home with a search warrant.

25 Q That's a fair enough statement. Right? Particularly people

1 who've never been exposed to that type of event before. Correct?

2 A Yes.

3 Q It could be unsettling, correct?

4 A I can't speak for them. We treat people very fairly and I
5 don't know if they're unsettled.

6 Q I'm not asking you about your treatment to them. I'm asking
7 that would be a fairly shocking event for somebody. Fair enough?

8 A For some people it might be.

9 Q For having 10 officers come into their home?

10 A Yes.

11 Q Yeah. And I think you indicated you were wearing a vest,
12 correct?

13 A Yes, sir.

14 Q How many others were wearing vests?

15 A The police officers at the door would have been wearing
16 vests.

17 Q That's eight people, including yourself?

18 A Would be eight detectives and one uniformed police officer.

19 Q So just you wearing a vest?

20 A No, I just said all the police at the door would be wearing
21 a vest.

22 Q Forgive me. Would they have been, would some people have
23 been in uniform?

24 A Yes, the uniformed patrol officer would be in uniform.

25 Q They have firearms with them?

1 A Yes. He's a uniformed police officer.

2 Q And do you have a firearm with you?

3 A Yes, sir.

4 Q Okay. So the 10 of you went to the home. Some of you in
5 uniform. Most in vests. Those vests are marked with what word?

6 A It would not be 10 of us that entered the home because the
7 one person there was a civilian, the forensic supervisor. He
8 would not be entering the home at that time.

9 Q So I stand corrected. Nine people entered the home?

10 A Yes, sir.

11 Q Okay.

12 A Actually, the uniformed patrol officer stays outside at the
13 front door and at least one or two detectives stay outside
14 because we bring the people outside.

15 Q Okay. And we'll come back to that in a moment. So seven
16 people perhaps entered the home?

17 A Possibly, yes.

18 Q Right? Was it dark out?

19 A Yes.

20 Q Did you have flashlights on?

21 A Yes.

22 Q Do you remember Ms. Hall coming down the stairs in a state
23 of surprise and perhaps alarmed at what was happening?

24 A Yes.

25 Q So again, that would just go to this is kind of a shocking

1 event for some people, correct?

2 A Yes.

3 Q And you said that you typically bring people outside, right?

4 A Yes.

5 Q Okay.

6 A We ask them to come outside.

7 Q Well, you said you bring them outside. I mean, do you ask
8 them kindly to step outside? Do you tell them, let's go outside?

9 A When I knock and announce on the door and someone answers
10 it, I ask them to step outside.

11 Q So you don't bring them out? You ask them out nicely?

12 A "Bring" is a word I'm using as a verb to just say that
13 they're asked to come outside.

14 Q Fair enough. And in any kind of investigation when you
15 arrive and you're likely to make an arrest, one thing that could
16 be helpful is getting a statement from somebody, correct?

17 A Yes.

18 Q And these can be, statements can be helpful in all cases,
19 correct?

20 A Yes. You made a statement that we're likely to make an
21 arrest. I wouldn't preface a search warrant service that we're
22 there likely to make an arrest.

23 Q Fair enough. Sometimes you search for evidence and no one's
24 arrested, correct?

25 A Correct.

1 Q You might still seize evidence but nobody's arrested?

2 A Yes, sir.

3 Q But in child pornography investigations, often, often there
4 is an arrest at the time of a search warrant execution, right?

5 A Sometimes, yes.

6 Q And in these computer-based investigations, particularly
7 child pornography investigations, statements can be extra
8 helpful, correct?

9 A Yes.

10 Q And that's because often there are to be multiple people
11 perhaps using a computer, right?

12 A Correct.

13 Q And you want to exclude some of the people from the universe
14 of potential users?

15 A Yes.

16 Q That can help you narrow down a target who may be the
17 suspect or the individual you want to arrest, correct?

18 A Yes.

19 Q That would be no different in this case, right? In this
20 case you'd want to do that?

21 A Yes, sir.

22 Q And to that end, you actually brought an audio recording
23 device with you, right?

24 A Yes, sir.

25 Q That was to record somebody's statement hopefully, right?

1 A Yes, sir.

2 Q But the initial interaction with Mr. Hall inside the home
3 when you say you first read him his rights, you did not record
4 that, did you?

5 A No, sir.

6 Q Why is that?

7 A We don't record that. We record the individual interviews.

8 Q Why don't you record that?

9 A We don't.

10 Q And at some point, did you say it was you that moved Ms.
11 Hall to the kitchen?

12 A I asked her to come to the kitchen, yes.

13 Q And you spoke with her separate and apart from Mr. Hall?

14 A Yes, sir.

15 Q Why separate and apart from him?

16 A When you have a criminal investigation, you don't want
17 potential witnesses or people that are corroborating to commit
18 that crime together to be able to talk to each other, develop a
19 story, come up with lies. So it's essential to a criminal
20 investigation to keep witness accounts separate so that they're
21 not tainted.

22 Q Basically, so you get a statement that you need from each of
23 them?

24 A Yes, sir.

25 Q Not going to develop the story right in front of you

1 together when you're right there, correct?

2 A Hopefully not.

3 Q And when you first came in, you asked him to sit on the
4 couch, is that right?

5 A Yes.

6 Q Okay. And at the same time there are a number of
7 individuals that are searching the home; is that fair to say?

8 A When they come back into the house, we have not started
9 searching.

10 Q Okay. So where are the other officers at this time, if
11 they're not searching?

12 A They're starting to label rooms with letters, take pictures.
13 There's a detective that's going to draw a sketch of the house.
14 Like I said before, there's lots of different jobs that are
15 starting to get done.

16 Q Sure. So there's officers fanning out through the home,
17 correct?

18 A Yes.

19 Q And the Halls on a couch?

20 A Yes.

21 Q And you're there with them?

22 A Yes.

23 Q And are there still officers outside?

24 A I don't know if there was anyone outside. At some point
25 there's coming and going.

1 Q Maybe yes, maybe no?

2 A Yes.

3 Q But at that time if Mr. Hall wanted to get up and run an
4 errand, that would have been okay with you?

5 A He was free to leave.

6 Q You would have let him leave the house had he wanted to?

7 A Yes.

8 Q And same is true with Ms. Hall, correct?

9 A Correct.

10 Q And in the audiotape, as the Assistant U.S. Attorney
11 indicated out, you said to Mr. Hall, "You don't want to answer
12 any more questions, right?"

13 A Yes.

14 Q And that's the one objective piece of evidence we have
15 that's recorded, correct?

16 A Yes.

17 Q Your claim that earlier Mr. Hall had just said he didn't
18 want to answer a specific question, that's not recorded, correct?

19 A Correct.

20 Q And you've already testified to this. You were the officer
21 that met with them on the couch and read him his rights in the
22 first instance?

23 A Yes, sir.

24 Q And you were the one who sought to question him at that
25 point and ceased, correct?

1 A Yes, sir.

2 Q Okay. And you're the same officer that later took him
3 upstairs, correct?

4 A Yes, sir.

5 Q Okay. And when you took him upstairs, you indicated that
6 you needed to talk to him further, correct?

7 A I did. I asked him if I could speak with him.

8 Q Yes. He didn't ask you to go upstairs, right?

9 A No, sir.

10 Q It wasn't his idea to go upstairs?

11 A No, sir.

12 Q It wasn't his idea to answer any questions, right?

13 A I did advise him of his Miranda rights and he decided to
14 answer questions.

15 Q To take him upstairs and ask him further questions?

16 A You asked me that. It was my decision to ask him to go
17 upstairs.

18 Q Fair enough. That's when you turned on the tape, correct,
19 when you're upstairs?

20 A Yes, sir.

21 Q Okay. And you did read him his rights? That's obvious from
22 the audio transcript.

23 A Yes, sir.

24 Q And it's equally obvious that he said he understood those
25 rights. There's no doubt about that. Did you stay with Mr. Hall

1 throughout the -- from the time he was seated on the couch to the
2 time he was taken upstairs, were you with him for the duration?

3 A No, sir.

4 Q For how much time did you leave him?

5 A The majority of that three-plus hours.

6 Q Do you know if anybody else questioned him during that time?

7 A No one else questioned him during that time.

8 Q How do you know that?

9 A Because Lieutenant Wiedeck was with him and he told me he
10 did not ask him any questions.

11 Q So a member of your law enforcement team told you that?

12 A Yes, sir.

13 Q Okay. And the questions you asked him when you were
14 upstairs, those were likely to elicit incriminating responses,
15 correct?

16 A Yes, sir.

17 Q And at that point, is it your claim that he was still just
18 free to go? He could have left and gone to run an appointment to
19 that point in time?

20 A Yes, sir.

21 Q And how long had you been there at that point? About three
22 hours?

23 A At that point it was approximately four.

24 Q I have no further questions, Your Honor.

25 REDIRECT EXAMINATION

1 BY MR. BUDLOW:

2 Q Just a couple, Your Honor. Typically when people from a
3 search warrant are sitting on a couch and you're doing other
4 things, don't you normally, you or other agents kind of chat them
5 up about non-substantive matters to keep and make them
6 comfortable?

7 A Lieutenant Wiedeck is the one that stays with people and,
8 yes, he'll do that sometimes.

9 Q But it didn't occur in this case because you said he told
10 you that he didn't talk to him at all?

11 A He told me he didn't ask him any questions.

12 Q Do you know why that is?

13 A Because he was standing there and heard Mr. Hall state that
14 he didn't want to answer that question.

15 Q And in terms of trying to determine at the time of the
16 search warrant who might use the computers, because, obviously,
17 it's the computers that led you to do this kind of a search
18 warrant, in this case -- actually, I withdraw that question.
19 That's all I have, Your Honor.

20 THE COURT: Okay. Thank you, Detective.

21 THE WITNESS: Thank you, sir.

22 THE COURT: Any other evidence on this motion?

23 MR. BUDLOW: No other evidence on the motion, Your
24 Honor.

25 MR. FEIN: One moment, Your Honor.

1 (Pause in proceedings.)

2 MR. FEIN: One witness, Your Honor. I'd call Belinda
3 Hall to the stand.

4 THE COURT: Okay.

5 THE CLERK: You may turn around and face me, and please
6 raise your right hand.

7 BELINDA HALL, DEFENDANT'S WITNESS, SWORN

8 THE WITNESS: Yes.

9 THE CLERK: Thank you. You may have a seat. You may
10 slide your chair up to the table, adjust that microphone down in
11 front of you. Please state and spell your full name for the
12 court.

13 THE WITNESS: Belinda Jane Hall. B-E-L-I-N-D-A.
14 J-A-N-E. H-A-L-L.

15 THE CLERK: Thank you.

16 DIRECT EXAMINATION

17 BY MR. FEIN:

18 Q Ms. Hall, were you present at your home on the morning of
19 September 7th, 2016?

20 A Yes.

21 Q Can you tell us what happened in the -- did there come a
22 time where law enforcement came to your home?

23 A Yes.

24 Q Can you explain to me what happened when they entered the
25 home and the atmosphere that prevailed?

1 A It was very scary because there was pounding at the door and
2 yelling. And I didn't understand what was going on. To be
3 honest, it sounded like it was coming from the back deck area.
4 And I thought maybe the house was on fire or something and they
5 were trying to warn us to get out.

6 Q Was it dark out?

7 A Yes.

8 Q Did you come down?

9 A Yes. My husband went down first and then there were voices.
10 And then he called me to come down. And I had to sort of shield
11 my eyes because there were big flashlights and -- but, yes, I
12 came downstairs.

13 Q When you came in, were there officers inside the home at
14 that point or no?

15 A Yes.

16 Q How many, if you recall?

17 A I don't recall.

18 Q Did it seem like a lot, a few, or very few?

19 A It was more than one, but I don't remember how many.

20 Q What was -- was that a shocking event for you?

21 A Yes.

22 Q Okay. And what happened from there?

23 A They told me to come outside. And they told me to stand
24 apart from where my husband was standing.

25 Q Who's "they?"

1 A Some officer. I don't, I don't specifically remember who it
2 was.

3 Q Did they ask you or did they tell you?

4 A I do not remember being asked. I don't know the exact words
5 that were used, but it was told as a directive.

6 Q Did you feel like you had a choice in the matter?

7 A None.

8 Q What happened next?

9 A I remember, and the reason I remember that they kept us
10 separate is because I was scared to death and I said "I am going
11 to go over to my husband, I'm scared." And so I did that. And
12 no one stopped me from doing it, but I was clearly taking
13 initiative that was not encouraged.

14 Q What happened next?

15 A We remained outside for a while. And then they said Let's
16 go back inside, and why don't we sit down in the living room.

17 Q And did you?

18 A Yes.

19 Q Okay. During any of those first few moments, the time they
20 entered till moment, did you feel like you could pick up and
21 leave the house if you wanted?

22 A Never.

23 Q Did you -- were you under the impression that your husband
24 could leave the house if he wanted?

25 A I was never under that impression.

1 Q Do you think that you were compelled to stay there?

2 A Yes. I, I remember the phone ringing at some point during
3 the morning because we had actually been expecting the plumber to
4 come by that morning. And I didn't even feel like we were
5 allowed to go and answer the phone. We obviously had to have
6 permission to go use the bathroom and had to be escorted. So
7 there was definitely an atmosphere of we have to sit here.

8 Q Did there come a time where you did have to use the
9 bathroom?

10 A I think me, at least once. Certainly my husband, yes.

11 Q Did you ask for permission?

12 A Yes, I asked for permission.

13 Q Were you escorted?

14 A Yes.

15 Q Did there come a time where your husband had to use the
16 bathroom?

17 A Yes.

18 Q Did he ask for permission?

19 A Yes.

20 Q Was he escorted?

21 A Yes.

22 Q Did you feel like you could do so without asking for
23 permission?

24 A Never.

25 Q Did that atmosphere as you interpreted it prevail throughout

1 the day?

2 A Yes.

3 Q Was there any time in those hours before the officers left
4 that you felt like you were free to leave and go about your
5 business as you so chose?

6 A Never.

7 Q I have no further questions, Your Honor.

8 CROSS EXAMINATION

9 BY MR. BUDLOW:

10 Q SO nothing like this had ever happened before?

11 A Never.

12 Q And when your -- you were scared, so you didn't go
13 downstairs when your husband went down, right?

14 A That's correct.

15 Q But then when he asked you to come down, then you came down?

16 A My best recollection -- I don't remember exactly how it
17 worked out. But I do remember hearing his voice and him
18 essentially saying, I don't remember exactly how he said it, but
19 like my sense was it was okay to come downstairs, like.

20 Q So somehow --

21 A Right.

22 Q -- your husband said to you --

23 A Yes.

24 Q -- you may come down?

25 A Yes.

1 Q And then you went down?

2 A Yes.

3 Q Because you trust him?

4 A Yes.

5 Q And you trust his judgment?

6 A Yes.

7 Q And he was telling you it was okay to come down?

8 A Yes.

9 Q And then -- you were here when just moments ago when
10 Detective Rees testified?

11 A I was.

12 Q And you heard him testify that when you and your husband
13 were allowed back in the house, after a few moments he came in
14 and the scene was more calm?

15 A Yes.

16 Q That's an accurate statement, isn't it?

17 A That is an accurate statement.

18 Q A little bit of noise and things going on at the initial
19 execution of the warrant. But within 10 or 15 minutes when you
20 went back inside, things had noticeably calmed down?

21 A Yes. He spoke in a normal inside voice.

22 Q No pounding on the doors or no --

23 A Right.

24 Q Is that right?

25 A That's correct.

1 Q And at that point you understood it wasn't a fire?

2 A Correct.

3 Q And it wasn't sort of a burglary or some sort of criminal
4 activity?

5 A Right.

6 Q You knew it was a law enforcement investigation?

7 A That is correct.

8 Q And, in fact, Detective Rees came in and in a calm voice
9 read to you the three or four-page search warrant so that you
10 understood that he was authorized to be there and actually why as
11 well?

12 A Right.

13 Q And did you appreciate that he was telling you that
14 information?

15 A Yes.

16 Q And at no time while you were, while the police were in your
17 home did they tell you you could not leave, did they?

18 A That is correct.

19 Q And they also never told you that you could not answer your
20 phone?

21 A That -- I don't remember.

22 Q I thought you testified earlier that you didn't answer it
23 because you didn't think you could answer the phone?

24 A Right. I don't specifically remember whether I asked, can I
25 answer that, or whether I just assumed I would not be allowed to.

1 Q And same thing with the bathroom. You asked for permission
2 because you say you thought you had to?

3 A Yes.

4 Q But they never said to you you had to ask permission before
5 you do so?

6 A I don't remember them saying I have to ask permission to do
7 anything.

8 Q Is it fair to say that while they were in your home, while
9 you were there with them, that the police officers present
10 treated you respectfully?

11 A Yes.

12 Q And that when Detective Rees came back in the home and read
13 you the warrant, then he also read you your Miranda rights? You
14 may not know they were Miranda rights. But your right to remain
15 silent.

16 A I understand.

17 Q The kind of thing you hear on TV, right?

18 A Yes.

19 Q He did, he did all those things?

20 A He did.

21 Q And you, when he asked you if you understood it, you said
22 that you did?

23 A I did.

24 Q And when he asked your husband if he understood it, he said
25 that he did?

1 A He did.

2 Q Going back to the more difficult time when you were outside
3 of your home, you said -- well, you testified earlier you were
4 scared, right?

5 A Yes.

6 Q And you said to the police officers, "I'm going over to my
7 husband because I'm scared?"

8 A Yes.

9 Q You didn't think they wanted you to do that, did you? In
10 fact, they told you otherwise?

11 A Right.

12 Q But they didn't stop you?

13 A They didn't stop me.

14 Q And they didn't yell at you or tell you that you shouldn't
15 do that, they just let you go?

16 A They did.

17 Q That's all I have. Thank you.

18 THE COURT: Thank you very much. That's all? Any
19 argument?

20 MR. BUDLOW: Oh, any argument? I'm sorry. I thought
21 you were asking for additional witnesses.

22 THE COURT: I actually was looking at Mr. Fein.

23 MR. BUDLOW: I'm happy to let him go first. It is my
24 burden. I'm happy to go first as well.

25 MR. FEIN: Your Honor, all I will say is, first, the

1 test for whether an individual's in custody is whether or not an
2 objectively reasonable person would feel free to leave. I think
3 there's little doubt that an objectively reasonable person in the
4 position of Ms. Hall would not have felt free to leave.

5 It matters not whether the officers told --

6 THE COURT: Well, is that the question or is the
7 question whether, if they're not free to leave, they're advised
8 of their Miranda rights?

9 MR. FEIN: So you have to be advised of your Miranda
10 rights if you're in custody and interrogated. So the threshold
11 question would be, is there custody?

12 THE COURT: Right.

13 MR. FEIN: So my point is, yes, there was custody
14 because an objectively reasonable person in the position of the
15 Halls would not have felt free to leave.

16 Eight officers entered the home, maybe seven. Ms. Hall
17 testified that it was a shocking experience, that she did not
18 feel free to go anywhere, that she felt like she was disobeying
19 or acting in contrast to directives simply by walking to her
20 husband.

21 So I think as a threshold matter, it's a fairly easy
22 determination that a reasonable person in the position of the
23 Halls would have felt in custody. They're in their home.
24 There's eight officers. They have vests. They have firearms.
25 They're being directed in whatever terms to step outside, to step

1 back inside. And the testimony of Ms. Hall was that not only was
2 it a frightening event at five in the morning in the dark, but
3 that she did not feel free to leave and she could sense the same
4 was true of her husband. So I think the custody determination is
5 not a difficult one to make.

6 Was there an interrogation? So the first interview by
7 Detective Rees was not audiotaped. When I asked him why, he said
8 because they don't. Why they don't remains a bit unclear. If
9 there's a point to having an audio recorder, I submit it would be
10 best to record all interactions with all citizens simply for
11 purposes of transparency.

12 But in any event, he read Mr. Hall his rights at that
13 point, so one would assume that he was preparing to interrogate
14 him. So it's custody and a likely interrogation. To Detective
15 Rees's credit, he didn't question Mr. Hall further when Mr. Hall
16 either said "I don't want to answer that question" or "I don't
17 want to answer any more questions", or "I don't want to speak
18 with you." So Detective Rees ceased questioning at that point.

19 Detective Rees was there, obviously, to question him
20 about the investigation. Three hours later, maybe four hours
21 later, Detective Rees determines it might be wise to speak with
22 Mr. Hall again. So he takes Mr. Hall upstairs, and again reads
23 Mr. Hall his rights. And Mr. Hall, on audiotape this time,
24 waives his rights and agrees to make the statement.

25 So here's what I would say. There was custody. There

1 was an interrogation. That is, there were questions put to Mr.
2 Hall that were likely to elicit incriminating responses. Miranda
3 rights were read to him. However, earlier in the morning he
4 indicated that he did not want to answer any more questions, so
5 he invoked sufficiently his right to remain silent. At that
6 point the officer should have cut off all questioning and should
7 have scrupulously honored Mr. Hall's right. He did not
8 scrupulously honor that right when at his own, that is Detective
9 Rees's own, determination, he brought Mr. Hall upstairs to a
10 bedroom, separate and apart from his wife, with a recorder,
11 ostensibly to get a statement from Mr. Hall, and reinitiated
12 contact with Mr. Hall for the purpose of getting a statement.

13 So while it's true that Mr. Hall waived his right, he
14 did so only under the following circumstances: Where he was in
15 custody, where he was being interrogated by an officer who had
16 interrogated or tried to interrogate him earlier in the morning
17 in the same home on the same topic, and this is simply three
18 hours later.

19 So I would submit to the Court that that second
20 interrogation was violative of Mr. Hall's Fifth Amendment rights
21 for those reasons.

22 MR. BUDLOW: Your Honor, if I could, I'd like to
23 address the three issues that I see. First one is that I'd ask
24 the Court ultimately to find that the defendant was not in
25 custody. Mr. Fein has accurately stated the standard, but

1 there's little more information about the standard that I think
2 is important to remember, which is what is custody.

3 And under Berkemer v. McCarty, a Supreme Court case, it
4 says that under the totality of the circumstances, the suspect's
5 freedom of actions curtailed to a degree associated with a formal
6 arrest. And the facts in this case are that a standard search
7 warrant was executed. Nothing unusual was done. And this really
8 presents to the Court a fairly routine scenario where the
9 officers -- of course it's scary for anybody at first who has
10 never been the subject of a search warrant. Things calm down.
11 They discuss everything in a conversational tone. Nobody's under
12 arrest. Nobody's told they can't leave.

13 There's literally no evidence of any restrictions on
14 their movement whatsoever. The defendant went to the bathroom.
15 He went inside and closed the door. No threats, promises or
16 force. And he displayed multiple times that he knew that he
17 didn't have to answer the questions.

18 So a reasonable person under those circumstances would
19 not have felt like they were in custody and they would have felt
20 at liberty to terminate the interview at any time which, of
21 course, the defendant demonstrated.

22 Because there's no custody, then there's no Miranda.
23 And because there's no Miranda necessary, then there's no reason
24 to address the issues of the rights under Miranda, which is where
25 the defendant wants you to go here. So there is no right to

1 remain silent that must be scrupulously honored. And I'd ask the
2 Court to make that as factual finding, that the defendant was not
3 in custody.

4 But, also, I'd ask to ask the Court to address if
5 Miranda did apply, that the defendant did not unequivocally
6 invoke his right to remain silent because what Detective Rees is
7 clear in what he said is that he's not going to answer that
8 question, which interestingly is an unambiguous statement. It's
9 just not invoking his right to remain silent, it's invoking his
10 right not to answer a specific question.

11 Without a doubt there is a recording that was done four
12 hours later where it seems to be a very casual reference to him
13 refusing to answer questions generally. Detective Rees has not
14 only explained in an incredible way, but has indicated he wrote
15 the exact wording that he testified to, that he didn't want to
16 answer that question, the same day on an application for
17 statement of charges and a police report, at least one of which
18 was filed under oath.

19 So just saying that he didn't want to answer one
20 question is not an unambiguous invocation of the right to remain
21 silent. But even if it were, so Miranda had been given. The
22 defendant had voluntarily waived Miranda. And then he refused to
23 answer that one question. If the Court were to interpret that as
24 an unambiguous invocation of his right to remain silent, that
25 invocation was scrupulously honored.

1 There's cases that held that, under similar
2 circumstances, police officers can reinitiate one hour later.
3 Here, the defendant remained on his couch. Nobody spoke a word
4 to him. They consciously didn't speak a word to him, unlike
5 normally where they would try to make people comfortable, engage
6 them in routine conversation. He sat there in silence because he
7 had made this unusual comment earlier on, so they left him alone.

8 Then four hours later, not two and a half, not 90
9 minutes, but closer to four hours later, Detective Rees asked the
10 defendant if he wanted to go upstairs and speak. Defendant
11 agreed. He went on tape. He voluntarily agreed to waive his
12 Miranda rights. During the interview, he understood that he
13 didn't have to answer them all and demonstrated that by saying
14 I'm not giving you the encryption to, I'm not giving you the key
15 to my encrypted hard drive. So he voluntarily waived.

16 And the five factors that determine whether or not if
17 someone is, under Miranda, and if they've invoked unambiguously,
18 whether or not law enforcement can reinitiate, four of the five
19 factors weigh clearly and heavily in favor of admissibility. And
20 the case law is that not all five factors, there's no formula as
21 to how many of them must weigh.

22 Those five factors are the defendant acknowledged that
23 he understood his rights; that questioning ceased immediately,
24 which it did; that a significant period of time, which the cases
25 have held can be as little as one hour, passed, during which no

1 attempt was made to wear down or repeated questioning or attempts
2 to question the defendant. The officer didn't display contraband
3 in front of him in a subtle way to try to get him to explain
4 things. They didn't engage in any trickery. They just left him
5 sitting there for four hours. A fresh set of Miranda is the
6 fourth. All four of those way heavily in favor of admissibility.

7 And the last one is whether or not the defendant was
8 questioned about a completely different substantive crime. The
9 government concedes, they were there for one reason, which was to
10 ask him about child pornography trafficking. He made a comment
11 about not wanting to answer who his internet service provider is.
12 Certainly shows a certain degree of savvy, especially in light of
13 the investigation. And later on they asked him the same
14 question. So that one of the five factors clearly does not weigh
15 in the government's favor, but the other four clearly do.

16 I would ask the Court, in denying this motion, to find
17 that the defendant was not in custody, that he did not
18 unambiguously invoke his right to remain silent, and that even if
19 he did, that invocation was scrupulously honored.

20 Thank you.

21 THE COURT: Anything further?

22 MR. FEIN: No, Your Honor.

23 THE COURT: I'm going to deny the motion. I mean, I
24 don't think that Mr. and Mrs. Hall were in custody. But I will
25 reach the Miranda issue. And Mr. Hall was twice told his Miranda

1 rights. I credit the detective, Detective Rees, as to what was
2 said. And it was only one of the questions that Mr. Hall
3 declined to answer. Four hours had passed. He was re-advised of
4 his rights. I don't think that there was any violation. So I
5 deny the motion to suppress statements.

6 Now, is that it?

7 MR. BUDLOW: I believe that's all the motions that are
8 Pending, Your Honor.

9 MR. FEIN: That's it, Your Honor.

10 THE COURT: And we have a trial date?

11 MR. BUDLOW: We do not have a trial date, Your Honor.
12 I would ask that we contact chambers, unless you wanted to try to
13 find something while we're here.

14 THE COURT: Okay. Contact chambers.

15 MR. BUDLOW: Very well. Thank you.

16 MR. FEIN: Just for the record, I object to the Court's
17 ruling on the motion and I will file a motion to reconsider with
18 respect to the motion to suppress evidence, but not the motion to
19 suppress statements. Thank you, Your Honor.

20 THE COURT: Thank you.

21 (Conclusion of Proceedings at 4:17 p.m.)
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REPORTER'S CERTIFICATE

I, Mary M. Zajac, do hereby certify that I recorded stenographically the proceedings in the matter of USA v. Martin Robert Hall, Case Number(s) JFM-16-469, on August 30, 2017.

I further certify that the foregoing pages constitute the official transcript of proceedings as transcribed by me to the within matter in a complete and accurate manner.

In Witness Whereof, I have hereunto affixed my signature this _____ day of _____, 2017.

Mary M. Zajac,
Official Court Reporter

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